The Court of Appeals on When a Payment is "Due"

The North Carolina Court of Appeals issued an opinion last week that may – or may not--have some implications for residential leases in North Carolina. At the very least, RME Management, LLC, v. Chapel H.O.M. Associates, LLC (filed 1/17/2017) makes me think I should give a longer answer when a small claims magistrate asks me a particular question about summary ejectment law. But more on that later. First, let's take a look at RME.

The parties in RME were businesses involved in a long-term commercial lease dating back to 1966. In fact, they had just reached an important milestone in their relationship, in which the defendant had given notice of their intention to exercise an option to renew the lease for an additional 49 years, effective January 1, 2016.

On September 21, 2015, the plaintiff notified the defendant that it was in default of the lease. Specifically, they had not paid property taxes "when due," which plaintiff understood to be September 1. In mid-October, the defendant responded to this notice denying default, challenging plaintiff's interpretation of "when due." The defendant's' argument that under North Carolina's property tax statute, GS 105-360, payment was "due" any time between September 1, 2015, and January 6, 2016. Because it was only October, said the defendant, the property taxes were not yet "due" and defendant was not in default of the lease provision.

The lease in RME contained a forfeiture clause, giving the landlord the right to terminate the lease "upon any default of the Lessee" if that default was not corrected by the tenant within 30 days after receiving notice. On October 27, the property taxes remaining unpaid, plaintiff notified defendant of its intention to terminate the lease and filed a summary ejectment action. Defendant paid the taxes a week later. The case was dismissed at the small claims level, and the plaintiff appealed to district court for a trial de novo.

The district court judge granted summary judgment for the defendants, based in part on the following finding:

The ordinary meaning of 'pay' and 'pay when due' customarily includes an implicit grace period during which payment can be made without being overdue; few obligations, and certainly not property taxes, are expected to be paid on the very first day they become due.

The Court of Appeals agreed, essentially reasoning as follows: The lease requires payment of taxes *when due*. To determine when taxes are due, we must look to the statute, which provides:

Taxes levied under this Subchapter by a taxing unit are due and payable on September 1 of the fiscal year for which the taxes are levied. Taxes are payable at par or face amount if paid before January 6 following the due date. Taxes paid on or after January 6 following the due date are

subject to interest charges.

The plaintiff argued that this statute provides that taxes are "due" on September 1, payable without penalty until January 7, and subject to a penalty after that date. The Court rejected that argument, finding that "due" and "payable" are synonymous, and that the "plain meaning" of the statute requires a finding that defendant had not breached the requirement that taxes must be paid "when due,"i.e., prior to January 7.

The result in RME makes sense, and the Court's rationale seems straightforward. On first reading, I mentally filed it as "Commercial Lease/Property Tax." But I found myself worrying about its implications for situations in my "Residential Lease/Breach of Lease Condition for Failure to Pay Rent" folder. Here's why.

Many—maybe most—written leases in North Carolina contain provisions similar to the following:

Rent is due and payable on the first of the month.

In the event that rent is paid more than five days late, a late fee of $15 or 5% of the monthly rent—whichever is greater—will be assessed….

In the event that tenant fails to pay rent when due, landlord has the right to terminate this lease without notice.

Here are two questions I'm often asked in reference to these provisions:

- If the tenant fails to pay on the 1st, can the landlord file a summary ejectment action on the 2nd?
- Does the late fee provision establish a five-day "grace period" requiring the landlord to delay filing the action until the sixth day of the month?

I have answered "yes" to the first question and "no" to the second with relative confidence on many occasions. My opinion has been that the two provisions are independent, establishing the landlord's separate rights to (1) terminate the lease if the rent is not paid when due—on the 1st; and (2) charge a late fee if the rent is more than five days late. I'm not yet sure whether or how RME changes my conclusions. But the tenor of the opinion certainly gives me pause.

Part of my uncertainty arises because the opinion makes no reference to the difference between a requirement that a payment be made *within a certain period of time* and a requirement stating that a payment is due on an identified date. This is entirely understandable, since the facts didn't involve the latter. But the Court's discussion of the "plain meaning" of the phrase "when due" is not clearly limited to payments which may be made over a period of time. The opinion quotes, but does not specifically address, the trial court's conclusion that the words "pay when due" is

"customarily" understood as including an "implicit grace period." The opinion specifically notes that the lease did not contain "qualifying language," such as "when first became due." Perhaps most strikingly, the Court dismisses plaintiff's argument about the meaning of the statute with unusually harsh language, calling the argument "a nonsensical, hyper-technical construction of the lease and NC property tax law." This is not the usual language of a court carving out a fine distinction in the application of an otherwise generally accepted rule – and so it makes me wonder about the steadiness of the latter.

The facts of RME certainly accommodate a narrow reading of that case. I think it is quite likely to be cited more broadly, though. One argument may be that a tenant is not in default of a lease requiring the payment of rent on the first of the month if payment is made on the second and the lease contains a late fee provision. These facts are arguably parallel to those RME; the argument would be that because rent is not late until the sixth, it is not "due" —placing tenant in default and thus triggering the forfeiture clause—until the sixth.

I believe this argument ignores an important reality about late fee provisions in residential leases. The widespread inclusion of the five-day requirement in residential leases is not a surprisingly uniform expression of patience on the part of landlords in terms of when rent should be paid. It is instead statutorily mandated by GS 42-46 in order for a landlord to charge any late fee at all!

A different question is presented by a straightforward lease providing simply that rent is due on the first of the month, and that the landlord has the right to terminate the lease in the event of default. It seems clear to me that the tenant who fails to pay rent on the first is in default on the second – but I'm a little worried about the idea of "an implicit grace period." In fact, I've found that many landlords and tenants (and some magistrates as well) assume that a 5-day grace period applies, no matter what the lease says.

One final observation: RME certainly indicates that "qualifying language" in a lease, clearly indicating the intent of the parties, will be given effect. While there may be some uncertainty about whether the words "when due" are sufficient to indicate clear intent, there is no such uncertainty about whether a more specific provision is enforceable. Thus, a landlord can seek summary ejectment on the second of the month if the lease contains a provision such as "Rent is due on the first and if payment is not made on or before the first, the landlord has the right to declare the lease terminated without further notice."

Time will tell whether RME sinks into obscurity or prompts modifications of residential leases across the State, and I'll be watching future developments with considerable interest . After reading the case many times and giving it a lot of thought, I'm still uncertain about its impact on summary ejectment law in residential cases. If you have thoughts, I'd love to hear them!