

Unconscionability, Public Housing & Summary Ejectment

In a [prior post](#), I talked about [Eastern Carolina Regional Housing Authority v. Lofton](#), 767 S.E.2d 63 (2014), a North Carolina Court of Appeals case requiring a landlord seeking summary ejectment based on breach of a lease condition to prove as an essential element of the case “that summarily ejecting [the] defendant would not be unconscionable.” Last week the North Carolina Supreme Court disagreed in a [long-awaited opinion](#), making clear that “the equitable defense of unconscionability is not a consideration in summary ejectment proceedings.” In so doing, the Supreme Court finally put the issue to rest, reconciling inconsistent statements of the law in several Court of Appeals cases, including [Lincoln Terrace Associates v. Kelly](#), Charlotte Housing Authority v. Fleming, 123 N.C. App. 511 (1996), and [Durham Hosiery v. Morris](#). Today, NC law provides that in an action for summary ejectment based on breach of a lease condition, it is sufficient for a landlord to demonstrate that the tenant breached the lease in a manner triggering the right to declare a forfeiture; the landlord has no additional burden to demonstrate that the result of such forfeiture will not be unconscionable. The [Lofton](#) opinion, written by Justice Newby, is significant for another reason: the Court also addressed the relative roles of a public housing authority (PHA) and a trial court in a summary ejectment action based on criminal activity in violation of the lease.

[Lofton](#) is an “innocent tenant” case, involving a fact pattern which has troubled courts for decades: a tenant in subsidized housing has a guest who—unknown to the tenant—engages in drug-related conduct on or near the rental premises. In 1988, in response to a public housing crisis involving drug activity, [Congress enacted law](#) requiring PHAs to include in their leases a provision permitting the housing authority to evict tenants if the tenants, their household members, or their guests were involved in drug-related illegal activity. In [Department of HUD v. Rucker](#), the U.S. Supreme Court specifically upheld the application of this law in the “innocent tenant” circumstance, noting the strong public policy concerns in favor of providing all tenants in subsidized housing with safe housing. The bottom line in [Rucker](#) was that a PHA has discretion to evict a tenant even though the evidence establishes that the tenant neither knew nor had reason to know of the criminal activity of a household member or guest.

In tracing the development of the law, [Lofton](#) points out that the [Rucker](#) Court, as well as HUD in the days following the decision, took pains to emphasize what the opinion said, and didn’t say: not that “innocent tenants” in these cases should be evicted, but rather that the PHA is vested with--and must exercise—discretion in determining whether to seek eviction. Justice Newby points out that [the HUD materials](#) reminded PHAs that the exercise of this discretion should be “guided by compassion and common sense,” with an eye toward enforcing leases in a manner that [“will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population.”](#)

This requirement that the PHA make a discretionary decision about whether to seek eviction when grounds exist for doing so played a significant role in [Lofton](#) at every level of the court system. The

trial judge denied ejectment based on a finding that the PHA erroneously believed that eviction was mandatory upon tenant's breach of the lease. On appeal to the Court of Appeals, the PHA pointed to the lease provision stating that breach of the lease condition related to criminal activity "shall be grounds for eviction" in support of its argument that it was required to seek eviction; the Court specifically rejected this argument, noting that the existence of grounds for eviction "simply means that the landlord is empowered, if it otherwise chooses to do so," to file an action for summary ejectment. The Supreme Court agreed, finding that the PHA "only considered whether the facts permitted eviction, thereby omitting the critical step of determining whether eviction should occur in this case."

The procedure described by Lofton and the authorities cited by the opinion is as follows: (1) First, the PHA must determine whether grounds exist under the lease to evict the tenant for criminal activity by the tenant, a household member, or a guest. (2) Next, the PHA must exercise its discretion to determine whether "eviction will most appropriately serve the statutory interest of protecting the welfare of the entire tenant population," based upon consideration of "a wide range of factors." [HUD has identified these factors](#) to include "among many other things, the seriousness of the violation, the effect that eviction of the entire household would have on household members not involved in the criminal activity, and the willingness of the head of household to remove the wrongdoing household member from the lease as a condition for continued occupancy." (3) If the PHA in the exercise of its discretion decides to file an action for summary ejectment, the role of the trial court according to [Lofton](#) is as follows: "In its role as the final forum for review of government housing decisions, the Court is not to second-guess or replace plaintiff's discretionary decisions but to ensure procedural and substantive compliance with the federal statutory framework." Specifically, the court must determine whether the facts establish grounds for termination, and whether the PHA has complied with applicable rules and regulations in its handling of the case. If so, the PHA is entitled to a judgment for possession. It is inappropriate for the court to substitute its own opinion for that of the PHA as to whether eviction was the best or wisest response to the tenant's breach.

One final note: the [Lofton](#) Court specifically notes that the asserted grounds for ejectment in this case was breach of a lease condition, rather than the statutory grounds contained in [GS Ch. 42, Art. 7](#) (Expedited Eviction of Drug Traffickers and Other Criminals). This will almost always be the case when subsidized housing is involved, because federal law requires a lease provision providing for forfeiture in the event of criminal activity. It is important to note that summary ejectment actions based on Art. 7, rather than on breach of a lease condition, will involve different legal issues and require a different analysis. One provision of the statute, for example, establishes an affirmative defense in the "innocent tenant" situation that will often yield an entirely different result than was the case in [Lofton](#). [GS 42-64](#).