



## **Magistrate Checklist: Essential Elements and Common Defenses in Summary Ejectment Actions**

**QUESTION:** How do magistrates get their training on the proper handling of summary ejectment cases?

**ANSWER:** An attorney named Dona Lewandowski is the faculty member at the UNC School of Government who has primary responsibility for teaching, writing, and advising magistrates about small claims law. According to Dona, all magistrates are required by statute to satisfactorily complete Basic School training in both civil and criminal law shortly after taking office. Magistrates attend nine days of training, with an entire day devoted to landlord-tenant law. No other topic, civil or criminal, is allocated as much time.

**QUESTON:** Are the training materials available to us?

**ANSWER:** Dona has shared several documents with us that she uses when she teaches landlord-tenant law, including a checklist entitled *Essential Elements and Common Defenses in Summary Ejectment Cases*. She says that she hands this *Checklist* out every time she teaches, and that she seldom teaches any landlord-tenant session without first at least briefly reviewing the grounds for summary ejectment as set out in the *Checklist*. She told me she encourages magistrates new to holding small claims court to keep the *Checklist* with them, and to listen to the evidence presented with the material in the *Checklist* foremost in mind.

**QUESTION:** Can we use the *Checklist*?

**ANSWER:** Yes. Dona has given us permission to share the *Checklist* with NC REALTOR® property managers "as an aid in improving the in-court communication between property managers and magistrates." A copy of the *Checklist* is accessible by [clicking here](#).

**QUESTION:** Can you explain how the Checklist works?

**ANSWER:** Yes. First of all, notice that it is divided into four sections: (1) Breach of a lease condition, (2) Failure to pay rent, (3) Holding over, and (4) Criminal activity. Why the four sections? Quoting Dona's *Introduction to Landlord-Tenant Law*, it's because "[t]he unique remedy of summary ejectment is available only in cases involving a simple landlord-tenant relationship **AND only** for [the] four specific breaches [listed above]."

After listing the four specific breaches, Dona's *Introduction to Landlord-Tenant Law* goes on to state that "[t]he most important aspect of making correct decisions in summary ejectment actions is identifying the grounds and then applying the rules associated with

that ground." In other words, in using the *Checklist*, a magistrate is instructed to first determine which of the four specific breaches is applicable to the case.

**QUESTION:** When I go to court for a landlord client seeking summary ejectment, which section of the *Checklist* applies to my case?

**ANSWER:** That will depend on a number of different factors, including what the lease agreement says. Assuming that the Residential Rental Contract (form 410-T) was used to create the lease, the case should **ALWAYS** be analyzed by the magistrate under the first section of the *Checklist*, which is breach of a lease condition for which re-entry is specified.

**QUESTION:** Why?

**ANSWER:** Because paragraph 17 of form 410-T specifically permits the landlord to terminate the lease or the tenant's right of possession and re-enter the property if the tenant breaches the lease in one or more ways specified in paragraph 17 (failure to timely pay rent, etc.).

**QUESTION:** I am a little confused. The second section of the *Checklist* is "Failure to pay rent." Most of the summary ejectment cases I file are on account of the tenant not paying the rent. Why wouldn't the magistrate go by that section of the *Checklist*?

**ANSWER:** Good question. This ground for eviction comes into play if the tenant fails to pay the rent and there is **no** forfeiture clause in the lease permitting the landlord to terminate the lease due to the tenant's non-payment of rent. The statute permitting termination in this situation is [N.C.G.S. 42-3](#). It requires the landlord to first make a demand for all past-due rent, and if the tenant refuses to pay within ten days, the landlord can then terminate the lease. However, as noted above, the NC REALTORS® standard rental contract DOES contain a forfeiture clause, so if the lease was created using form 410-T, this ground for eviction is not relevant. In other words, as noted in footnote 4 at the end of the *Checklist*, "[w]hen parties have agreed on grounds and procedure for forfeiture in lease, their contractual provision overrides GS 42-3."

**QUESTION:** Okay, thanks. I see that the magistrate needs to zero in on the first section of the *Checklist*. Once he or she does so, what's next?

**ANSWER:** If you look at the first section of the *Checklist* under "Plaintiff/LL must prove," you can see that the magistrate will expect you to prove 4 things, which are:

- (1) the existence of a landlord-tenant relationship
- (2) the lease contains a forfeiture clause
- (3) the tenant breached the lease in a way that permits termination
- (4) you followed the procedure set out in the lease for terminating the lease

**QUESTION:** I see that the first section of the *Checklist* also lists three "Common Defenses." What are they?

**ANSWER:** The first two defenses listed are "failure to follow lease procedure" and "[tenant] has not breached." However, if you've introduced documentation or other evidence proving items (3) and (4) above, neither of these defenses should be successful.

The third defense listed under "Common defenses" is "waiver." A "waiver" defense is where a party claims that the other party has by its conduct relinquished a legal right it may have had. In the context of a summary ejectment action, this would typically come up where you have terminated the lease due to nonpayment of rent and then accepted all or part of the rent. If the tenant refuses to surrender possession and you file a summary ejectment action, the tenant may try to argue that in accepting the rent you waived your right to retake possession of the premises based on the nonpayment of rent.

**QUESTION:** I thought the law now says that we can accept a partial payment of rent without waiving the right to possession of the property.

**ANSWER:** That is correct. [N.C.G.S. 42-26\(c\)](#) states that the lease may provide that the landlord's acceptance of partial rent doesn't waive the tenant's breach for which the right of reentry was reserved. Since paragraph 17(d) of the Residential Rental Contract includes the statutory wording, your acceptance of a *partial* rent payment should not give the tenant a successful "waiver" defense. If the magistrate is unsure about this, you should respectfully note that this issue is addressed in footnote #2 in the *Checklist* and perhaps offer to show the magistrate a copy of the *Checklist* if he or she doesn't have it handy.

**QUESTION:** One last question. I once had a magistrate throw one of my cases out because the tenant had offered to pay the past-due rent and court costs and I refused to accept it. Was the magistrate right? I don't see that listed as one of the defenses.

**ANSWER:** Another good question. [N.C.G.S. 42-33](#) provides that if the tenant "tenders" the rent due and the costs of the action before judgment is given in a summary ejectment action, all proceedings in the action shall cease. However, court cases have made it clear that this statute does not apply if the lease provides that the landlord can terminate the lease for nonpayment of rent and the landlord has exercised that right. That's why "tender" is not listed as one of the "Common defenses" under the first section of the *Checklist*. Note, though, that "tender" is listed as a defense under the "Failure to pay rent" section of the *Checklist*. That's because, as noted earlier, this ground for eviction applies in cases where there is **no** forfeiture clause in the lease. If the lease doesn't permit the landlord to terminate the lease for nonpayment of rent, then N.C.G.S. 42-33 *does* apply and the tenant's tender of the rent and court costs *would* be a defense.

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