



How long must you wait before filing an eviction for nonpayment of rent?

QUESTION: I'm having a friendly disagreement with another broker in my office about how long you have to wait before you can evict a tenant for non-payment of rent. Can you help us resolve our disagreement? Just so you know, there's a dinner riding on it.

ANSWER: Whoa! High stakes. What's the disagreement about?

MANAGER: Let's say a tenant doesn't pay her rent on the date it's due. My buddy says you can file eviction papers once the rent is five days or more late. I say you have to wait until you've given them 10 days to pay after making demand for the rent. Which of us is right?

LAWYER: The answer will depend partly on what the rental contract says. Do you use the NC REALTORS® Residential Rental Contract (Form 410-T)?

MANAGER: Yes.

LAWYER: In that case, you and your buddy are both wrong.

MANAGER: What? How can that be?

LAWYER: First of all, your buddy's probably thinking about [NC General Statutes Section 42-46\(a\)](#), which permits a lease to include a late fee equal to the greater of \$15.00 or five percent of the monthly rent if the rent is five or more days late. But that statute addresses how many days you have to wait before you can charge a late fee; it doesn't govern how long you have to wait before you can terminate the lease and file for eviction.

MANAGER: Okay, that's what I thought. But I don't understand why you think I'm wrong too. Are you familiar with the Summary Ejectment Complaint form ([AOC-CWM-201](#))? It says in the very first check box in Section 3 that "The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint." I've filed quite a few evictions for nonpayment of rent and that's the box I've always checked!

LAWYER: We are familiar with the AOC's Complaint in Summary Ejectment form. The fact of the matter is that if you've been checking the first box when you've filed evictions based on nonpayment of rent where the lease was on the NCR Residential Rental Contract, you've been checking the wrong box.

MANAGER: Huh?

LAWYER: Take a look at the instructions that accompany the AOC Form. Section 6 of the Instructions makes it clear that you check the first box when there isn't a written lease that includes a forfeiture clause. If you're filing the eviction under a written lease that includes a forfeiture clause, you're supposed to check the third box in Section 3 of the Complaint Form, which says "The Defendant breached the condition of the lease described below for which re-entry is specified."

MANAGER: What is a forfeiture clause?

LAWYER: It's a provision in a lease providing in essence that the landlord may terminate the lease if the tenant breaches the lease. It gives the landlord the contractual right to end the lease because of the tenant's breach. Paragraph 17(a) of the Residential Rental Contract contains a forfeiture clause giving the landlord the right to terminate the lease if the tenant fails to pay the rent when it is due or fails to perform any other lease obligation for five days following written notice of the failure.

MANAGER: What if there's no forfeiture clause in the lease?

LAWYER: We will answer that question by quoting from a document entitled *Introduction to Landlord-Tenant Law* by Dona Lewandowski, a longtime member of the faculty at the UNC School of Government who instructs magistrates on summary ejectment procedures:

"If the landlord has no contractual right to end the lease because of tenant's breach, the general rule is that a landlord's only remedy is money damages caused by the tenant's behavior. If the particular breach is failure to pay rent, however, NC law throws the landlord a life preserver...The General Assembly passed a law specifically targeting a situation in which a tenant is occupying property, not paying rent, and refusing to leave by creating a statutory procedure allowing the landlord to eject the tenant if all efforts to obtain payment fail."

The law Dona refers to is [NC General Statutes Section 42-3](#). It might come in handy for a professional property manager who takes over the management of a property where there's either no written lease or the landlord used a lease form that doesn't have wording permitting the landlord to terminate the lease if the tenant breaches. Otherwise, as Dona's materials go on to point out, this ground for eviction is *only* available if there is *no* forfeiture clause in the lease.

MANAGER: Wow, that's confusing!

ATTORNEY: Yes, it is. It's sometimes confusing to magistrates, too. In addition to the *Introduction to Landlord-Tenant Law* referenced above, Dona has shared another document with us that she uses when she teaches landlord-tenant law to the magistrates. It's 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.

MANAGER: 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](#).

As you can see, the *Checklist* 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]."

MANAGER: Based on what you've said, if I'm asking for eviction based on nonpayment of rent and the Residential Rental Contract was used to create the lease, the magistrate should always analyze the case under the first section of the *Checklist*, which is breach of a lease condition for which re-entry is specified. Is that right?

LAWYER: In the great majority of cases, yes. However, you may on occasion need to evict a tenant who is "holding over" after the end of their lease. For example, if either the tenant or the landlord gave proper notice that they were not renewing the lease at the end of the existing term, and the tenant continues to occupy the property after the last day of the that term, they would be holding over. If they refuse to surrender the premises, you could file the eviction right away, and you should check the second box in Section 3 of the Summary Ejectment Complaint Form, which states: "The lease period ended on the above date and the defendant is holding over after the end of the lease period."

MANAGER: So, if my buddy and I are both wrong, how long ***do*** you have to wait before you can evict a tenant for non-payment of rent?

LAWYER: Assuming the lease was created using the Residential Rental Contract, there is ***no*** required period of time that you would have to wait. If the rent is not paid on or before the due date in paragraph 2 of the Rental Contract, the last sentence of paragraph 2 provides that "Rentals not paid on or before the first day of the Payment Period will be considered late, and any such non-payment will constitute a breach of this Agreement." Paragraph 17(a) reiterates that failure to pay the full amount of rent when it is due is a breach of the lease, and further provides that in the event of a breach, the landlord may, at its option, terminate the lease. That means the landlord can terminate the lease and file for summary ejectment any time at after the rent is late, provided that the landlord has terminated the lease in accordance with the lease agreement and the tenant has refused to surrender possession of the premises upon the landlord's demand.

NC REALTORS® provides articles on legal topics as a member service. They are general statements of applicable legal and ethical principles for member education only. They do not constitute legal advice. If you or a client requires legal advice, the services of a private attorney should be sought. Always consult your broker-in-charge when faced with a question relating to the practice of real estate brokerage.

© Copyright 2020. NC REALTORS®. All rights reserved. No reproduction of any part may be made without the prior written consent of the copyright holder. Any unauthorized reproduction, use, disclosure or distribution is strictly prohibited.