II.

What Should The Landlord Do If The Tenant Abandons The Premises?

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A. Elements of Abandonment

"Abandonment by tenant requires an intention by tenant to abandon, plus conduct by which the intent is carried into effect." Friedman, §16.301, p. 1092. There must be evidence of intent not to be bound by the lease, and the tenant must vacate the premises.

There are a number of scenarios in which a tenant vacates the premises but has not "abandoned" the premises. For example, a tenant may abandon the premises because the tenant's implied covenant of quiet enjoyment was breached and/or the tenant was constructively evicted. For an example of a constructive eviction case, see McNamara v. Wilmington Mall Realty Corp., 121 N.C. App. 400, 466 S.E.2d 324 (1996), rev. den., 343 N.C. 307, 471 S.E.2d 72 (1996) (the Court of Appeals upheld jury verdict finding that tenant had been constructively evicted by noise of adjacent tenant). In addition, as discussed below, the landlord may accept a surrender of the premises by the tenant.

B. Landlord's Options When Tenant Abandons

1. Accept Surrender and Terminate Lease

If the landlord accepts the surrender of the premises by the tenant, the lease is thereby terminated, and the landlord has no right to recover rent/damages for the remainder of the lease term. Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928); Womble v. Leigh, 195 N.C. 282, 142 S.E 17. (1928). The landlord is only entitled to the payment of rent until the time of abandonment.

2. Refuse Surrender and Repossess Premises

If the landlord hopes to recover rent/damages for the remainder of the lease term, the landlord must be careful not to accept the surrender of the premises by the tenant. Because the issue of whether the landlord has accepted or refused the surrender is a question of intent, Monger, supra, it is imperative that the landlord exercise extreme caution in its actions. The act of repossessing the premises must be done in such a way that the landlord's actions are not deemed to evidence an intent to accept the surrender.[1] The burden of proof of surrender is on the tenant. Friedman, §16.301, p. 1094.

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[1] A decision by the landlord not to repossess the premises might help to ensure that the landlord will not be deemed to have accepted the surrender. However, in light of the duty to mitigate in North Carolina, not taking repossession of the premises may be impractical. In addition:

> Although a liability for rent continues so long as the lease is in existence, landlord is generally and justifiably reluctant to leave its property vacant and lose opportunities to relet, merely to pile up money judgments against a tenant who has walked out on a lease.

Friedman, §16.3, p. 1090.

From a practical standpoint, there are certain things that a landlord should do when a tenant has abandoned the premises. The landlord should immediately notify the tenant that the landlord does not accept the surrender of the premises and that liability for rent will continue and that the landlord will hold the tenant liable for breach of contract damages. In addition, if permitted by the lease, notification to the tenant should also indicate that the landlord will repossess the premises on tenant's behalf, without terminating the lease, in order to minimize tenant's damages. See Monger, supra (supports reentry after abandonment when no right of reentry exists in the lease); Friedman, §16.302, p. 1099.

If the landlord repossesses the premises for his own use, the landlord may be deemed to have accepted the surrender. Monger, supra. The issue of whether a landlord intended to accept the surrender is contingent upon the facts and circumstances.

It is not uncommon for an abandoning tenant to return the keys to the landlord. The Supreme Court in Monger recognized the general rule that a landlord could accept the keys for the tenant's benefit in order to relet the premises so long as the tenant was notified that the landlord was not accepting the premises. However, the Supreme Court did not ultimately rule on the issue. Out of an abundance of caution, a landlord may not want to accept keys because such acceptance could be deemed as an acceptance of surrender. Dixon, p. 17. However, if a landlord finds itself in a position where it is holding the keys, the above-described notification to the tenant should be made.

A collection of cases from other jurisdictions can be found in Friedman beginning at page 1094. A summary of the conclusions drawn from the collected cases is as follows:

Examples of Nonacceptance of Surrender

- Reentry to keep premises safe from the elements
- Reentry to make ordinary repairs
- Reentry to repair fire damage
- Reentry to comply with legal requirements
- Reentry to post "For Rent" sign
- Reletting to minimize damages

Examples of Acceptance of Surrender

- Nonessential repairs that may be deemed as made for landlord's use (may depend on whether lease permits reentry to make repairs for reletting)
- Reentry for landlord's use or residential purposes

- Any acts in excess of those provided for in the lease or reasonably necessary to protect the premises

See also, Dixon, p. 18 (citing, In re Mountain States Sports, Inc., 4 Bankr. 477 (D. Colo. 1980); B.K.K. Co. v. Schultz, 7 Cal.App. 3d 786, 86 Cal.Rptr. 760 (1970); Gainer v. Griffith, 76 W.Va. 426, 85 S.E. 713 (1915); Coffin v. United Mfg. Trimming Co., 85 Misc. 402, 147 N.Y.S. 463 (1914).

C. Monetary Damages

Rather than wait until the expiration of the lease term to recover damages for future rent covering the remainder of the lease term after the abandonment, a landlord in North Carolina can sue immediately for damages. Womble, supra; Coulter v. Capitol Finance Co., 266 N.C. 214, 146 S.E.2d 97 (1996)("The abandonment of the lease by the assignee does not relieve the assignee from liability for rent for the remainder of the term."). In Womble, the Supreme Court described a landlord's entitlement to damages after an abandonment by the tenant:

> The measure of damages for the wrongful breach of a rental contract and abandonment of the demised premises or refusal to enter, on the part of the lessee, is the difference, if any, between the rent reserved in the contract and the rent received from another letting, or the fair rental value where the lessor reenters and uses the premises for the benefit of the lessee on his account without effecting a surrender or terminating the lease.

Monger, supra; Womble, supra. In Eutaw Shopping Center, Inc. v. Glen, 39 N.C. App. 67, 249 S.E.2d 459 (1978), the court permitted the landlord's damages to be based on the difference between the contract rate and the actual rental collected. Although not discussed in Eutaw, if a tenant can show that the actual rental collected is less than the reasonable rental value, the tenant would have a strong failure to mitigate argument, and thereby could argue that damages should be determined by subtracting the reasonable rental value from the actual contract rate.

For those interested in the theoretical, the rationale for permitting the recovery of future rents after an abandonment is subject to an academic debate. Professors Hetrick and McLaughlin state that North Carolina applies the doctrine of anticipatory breach. Webster's, §12-29. However, Mr. Friedman considers the position taken by the North Carolina Supreme Court in Womble as the application of an analogous but different doctrine than that of anticipatory breach. Mr. Friedman believes that North Carolina treats abandonment as a "total breach" which arises out of renunciation plus an actual breach. Friedman, §16.302, p. 1100. The distinction is merely academic. The end result is that the landlord should be able to recover the entire contract amount subject to a duty to mitigate damages (the reasonable rental value).

Ancillary to the question of the recovery of future damages is the issue of whether a landlord may enforce a lease provision to accelerate rent and regain possession after the tenant has abandoned the property. Although not addressed in any North Carolina cases, the general rule for determination of damages which is set forth in Womble and Leigh would suggest that a landlord could not recover the entire remaining rent based on an acceleration clause. The

acceleration clause may be viewed as punitive like a liquidated damages clause. Because the landlord is under a duty to mitigate, the general rule should apply that the landlord's damages are limited to the difference between the contract rate and the fair market value for the remainder of the term.

III.

The Commercial Eviction Action

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When a tenant breaches a commercial lease and remains on the premises, the landlord has various remedies that it can pursue depending on the circumstances:

- Termination and dispossession
- Monetary damages (past rents, consequential damages and future rents)
- Injunctive relief
- Specific performance

A. Termination and Dispossession

Once the tenant breaches the lease, the landlord often wants to remove the tenant and replace it with one that the landlord is confident will comply with the terms of the lease. However, the tenant often remains on the premises with little intention of forfeiting the remainder of the lease term. Does the landlord have a right to forfeit or cancel the tenant's leasehold interest? If so, how can it be accomplished?

1. Is There a Right of Forfeiture?

"The law does not look with favor on forfeitures of leases." Couch v. ABC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980)(citing, 49 Am.Jur.2d Landlord and Tenant §1021 (1970)).

a. Forfeiture Based on Terms of the Lease

Except for a limited statutory exception under G.S. §42-3 which is discussed below, "[u]nless there is an express provision for forfeiture in a lease, a breach of a covenant does not work a forfeiture." Couch, supra. The requirements to dispossess a tenant have been set forth in a case involving a residential lease:

> In order to evict a tenant in North Carolina, a landlord must prove: (i) that it distinctly reserved in a lease a right to declare forfeiture for the alleged act or event; (ii) that there is clear proof of the happening of an act or event for which the landlord reserved the right to declare a forfeiture; (iii) that the landlord promptly exercised its right to declare forfeiture, and (iv) that the result of enforcing the forfeiture is not unconscionable.

Charlotte Housing Authority v. Fleming, 123 N.C. App. 511, 473 S.E.2d 373 (1996)(citing, Morris v. Austraw, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967)).

b. Statutory Forfeiture under G.S. §42-3

If the lease does not include a right to declare a forfeiture for breach of a covenant or condition of the lease, a limited statutory provision provides a landlord the right to declare a forfeiture when the default is the failure to pay rent. G.S. §42-3 provides:

> In all verbal or written leases of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after demand is made by the lessor or his agent on said lessee for all past due rent and the lessor may forthwith enter and dispossess the tenant without having to declare such forfeiture or reserve the right of reentry in the lease.

Id. In other words:

> Where there is a definite time period for the payment of rent even though the lease is silent as to a forfeiture for nonpayment, upon the tenant's failure to pay all past due rent within ten days from demand therefore, the lessor may reenter and dispossess the tenant, even though no right of reentry or forfeiture provision has been reserved in the lease.

Patrick K. Hetrick and James B. McLaughlin, Jr., Webster's Real Estate Law in North Carolina, §12-16, p. 418 (4th ed. supp. 1997)[hereinafter referred to as "Webster's"].

Forfeiture under G.S. §42-3 is dependent upon compliance with the demand requirement therein. "[A] forfeiture under N.C.G.S. 42-3 for failure to pay rent is not effective until the expiration of ten days after a demand is made on the lessee for all past due rent." Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591 (1982). The court in Snipes set forth the following requirements for a proper "demand":

> We hold that to constitute a "demand" under N.C.G.S. 42-3, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary .... The demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise his or her statutory right to forfeiture for nonpayment of rent.

Snipes, supra.

G.S. §42-33 provides a statutory defense to forfeiture under G.S. §42-3. Essentially, G.S. §42-33 permits a tenant to pay or tender the rent due before judgment which results in all further proceedings terminating. Specifically, G.S. §42-33 provides:

> If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings and such actions shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time such payment, or to the time of the tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed.

Id.; see Green v. Lybrand, 39 N.C. App. 56, 249 S.E.2d 443 (1978) (the court found that the defendant tendered all rent due and all costs incurred by depositing the money with the clerk of court and, according to G.S. §42-33, the action was properly dismissed).

An interesting issue arises when the landlord declares a forfeiture based on express lease language rather than G.S. §42-3, and the tenant attempts to revive the lease by tendering the rent after the cure period has expired, but before a summary ejectment proceeding has been completed. "It has been held that [G.S. §42-33] has no application if the terms of the lease provide the lessor can terminate the lease upon nonpayment of the rent." Couch, supra.

c. Materiality of Breach

(1) General Rule

Consistent with the prevailing dislike of forfeiture, a majority of jurisdictions will not permit forfeiture of a lease unless the tenant's breach is material. Roland F. Chase, Commercial Leases: Application of Rule that Lease May Be Canceled Only for Material Breach, 54 A.L.R. 4th 595 (1987) [hereinafter referred to as "Chase"].

(2) Rationale

The rationale for the rule requiring a material breach has been stated by one commentator as:

> [The] right to cancel for breach is not unlimited. One significant limitation . . is based on the common-sense notion that even if the parties gave formal consent to lease language providing that "any breach" gives rise to a right to termination, the possibilities of a modern commercial lease are virtually limitless and undoubtedly the parties did not have in mind minor or technical failures to adhere to lease provisions. Moreover, the potential harshness inherent in abruptly declaring a lease at an end, especially where the party in breach stands to suffer substantial loss from its termination, makes courts reluctant to enforce forfeiture clauses or

> to allow other involuntary termination of leases, and has resulted in the widely accepted "material breach" rule.

Chase, §2[a]. Another commentator has further explained:

> Should the landlord's right to cancel a lease as a result of a default extend to every clause in the lease? If landlords interpreted their rights under their leases literally and the courts were willing to terminate leases because of breaches of minor obligations, all tenants would occupy their premises at the whim of their landlords. Retail tenants agree to hundreds of covenants when they execute leases. A landlord who searches diligently, can find that some kind of breach exists under one of those covenants.
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> Because of the drastic consequences of the enforcement of default cancellation clauses, courts have tended to refuse enforcement when the lease provision that was violated was not significant. Although leases usually provide that the landlord may cancel if the tenant is in default under any provision of the lease, judicial legislation has limited the landlord's option to cancel defaults that the courts consider to be "material".

Emanuel B. Halper, People and Property: When is default material?, Real Estate Review, p. 33 [hereinafter referred to as "Halper"].

(3) North Carolina Position

Although the issue is rarely discussed in North Carolina appellate opinions, North Carolina courts do appear to require a "material" breach to justify a termination of a lease. Loomis v. Hamerah, 140 N.C. App. 755, 538 S.E.2d 593 (2000) (in a footnote, the Court stated: "To the extent there has been a breach of any provision of the Lease, not every breach 'justifies a cancellation and rescission' of the contract. To justify termination of a lease, the breach 'must be so material as in effect to defeat the very terms of the contract.'"); see Marantz Piano Co., Inc. v. Kincaid, 108 N.C. App. 693, 424 S.E.2d 671 (1993) ("Nonetheless, if the vendee breaches a material provision of the contract to lease/purchase, the vendor, as the aggrieved party, may cancel the contract . . . . In order to cancel the contract, there must be, within a reasonable time after knowledge of the material breach, an election by the aggrieved party to cancel."); see also Bowman v. Drum, 97 N.C. App. 505, 389 S.E.2d 125 (1990) (the court stated that liability insurance requirement in a lease was "material" provision; statement not made with respect to a forfeiture action and materiality not an issue before the court).

Notwithstanding the above-referenced North Carolina cases, a landlord seeking forfeiture of a tenant's leasehold interest through a summary ejectment proceeding may wish to rely upon G.S. §42-26(2) which provides, in pertinent part, for forfeiture:

> When the tenant or lessee or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

Id. (emphasis added). The plain language of the statute merely requires any act which, according to the stipulations of the lease, provide for a forfeiture (cessation of lease). Arguably, "any act" is broad enough to cover both material and non-material breaches. However, a landlord pursuing self-help dispossession has no statutory language to fall back upon. Therefore, before a landlord proceeds with self-help dispossession, it should be satisfied that the breach by the tenant is material.

(4) Determination of Materiality

Assuming the application of the materiality requirement in North Carolina, the following discussion should provide some help in determining whether a breach is material. A consideration of the following three issues aids in the determination of whether a breach is material:

- The Type of Default
- The Circumstances
- The Degree of Harm to the Landlord

Halper, p. 36.

(a) The Type of Default

Collected hereinbelow is a summary of how the courts of other jurisdictions treat different types of defaults:

- Nonpayment of Rent - Most cases find that the nonpayment of rent is material. Fifty States Management Co. v. Pioneer Auto Parts, Inc., 389 N.E.2d 113, 415 N.Y.S.2d 800 (1979)(2 months behind); Ferro v. Ferrante, 103 R.I. 680, 240 A.2d 722 (1968)(tenant deducted $10 from rent payment). "The failure to pay rent is usually the most material of all material defaults. Tenant's failure to pay rent discontinues the income stream that the landlord needs to provide essential services and to pay the mortgage debt and real estate taxes." Halper, p. 42. Nevertheless, there are some cases in which nonpayment of rent was held to be non-material. Bernstein v. Weinstein, 220 Ill.App. 292 (1920)(delay of 4 days was negligible); Beck v. Trovato, 260 Iowa 693 (1967)(one check dishonored). Often, the materiality of the default depends on whether the payment was ultimately paid, how late the payment was and how often is the tenant late in making payments. Late payment of rent may not be a material breach if it is the first time or if payment is made just after the grace period expired.

- Failure or Late Payment of Taxes or Utility Bills - When the amount of the unpaid taxes is large, the default may be material. Bolon v. Pennington, 6 Ariz.App. 308, 432 P.2d 274 (1967)(unpaid taxes of nearly $9,000 was material). The breach may be non-material when the amount at issue is small or the landlord does not know that the tenant is responsible for such charges. Acme Precision Bldg., Ltd. v. Dayton Forging & Heat Treating, Inc, 23 Bankr. 79 (1982)(amount of charges amount to less than one month of rent).

- Breach of Covenant of Repair - Material breach may be found when walls, roofs and air conditioning units deteriorate substantially. 1985 Robert Street Associates v. Menard, Inc., 403 N.W.2d 900 (Minn.App. 1987). A breach may be non-material when a building was constructed cheaply and the repairs relate to minor matters, or are due to construction defects or reasonable wear and tear. Kaplan v. Flynn, 150 N.E. 872 (Mass. 1926).

- Unauthorized Alterations and Additions - Material breach may result from substantial remodeling. Feist & Feist v. Long Island Studios, Inc., 29 App.Div.2d 186, 287 N.Y.S. 2d 257 (1968). A breach may not be material when the alterations are not extensive or are temporary. Pollock v. Adams, 548 S.W.2d 239 (Mo.App. 1977)(temporary partition).

- Unauthorized Assignment or Subleasing - A number of courts consider an unauthorized assignment or subletting as material. Nicoli v. Frouge Corp., 368 A.2d 74 (Conn. 1976); El Prado Restaurant, Inc. v. Weaver, 268 So.2d 382 (Fla.App.Dist.3 1972).

- Failure to Comply with Laws and Regulations - Violations of building code provisions which constituted a fire hazard have been deemed material. FFG., Inc. v. Jones, 708 P.2d 836 (Haw.App. 1985); Lewis v. Clothes Shack, Inc., 309 N.Y.S.2d 513, rev'd on other grounds, 322 N.Y.S.2d 738 (1970). Trivial violations of laws and violations that do not put the premises at physical risk have been held to be non-material. Keating v. Preston, 42 Cal.App.2d 110, 108 P.2d 479 (1949)(violation of gambling law); Madison Stores, Inc. v. Enkay Sales Corp., 142 N.Y.S.2d 132 (1955)(placement of signs in windows violated zoning law).

- Failure to Comply with Restrictions on Use - The materiality of breaches concerning use depend on the extent and scope of the violation. Completely changing the use of the premises from a motion picture studio to a discotheque was held to be a material breach. Feist & Feist v. Long Island Studios, Inc., 287 N.Y.S.2d 257 (1968). Merely selling a few unauthorized items, where a wide variety of merchandise was permitted, was held to be non-material. Rubinstein Bros. v. Ole of 34th Street, Inc., 421 N.Y.S.2d 534 (1979). Of course, if this subjects the landlord to being in breach of a material provision of another tenant's lease (i.e, because of an "exclusive" for a certain type of merchandise), that changes the analysis.

- Failure to Maintain Insurance Coverage - Failure to carry sufficient fire insurance coverage often is deemed material. Brainard Mfg. Co. v. Dewey Garden Lines, Inc., 435 N.Y.S.2d 417 (1981); Pro-Action Partnership v. Bonaparte's Fried Chicken, Inc., 392 So.2d 146 (La.App.1st Cir. 1980). In North Carolina, a liability insurance provision was considered material. Marantz, supra. Failure to provide a copy of policy of insurance that had been obtained was not material. Intertherm, Inc. v. Structural Systems, Inc., 504 S.W.2d 64 (Mo. 1974).

- Breaches Relating to Signs or Advertising - Generally, violations of lease provisions restricting the erection of signs are not material breaches. Madison Stores, supra.

See also Halper, pp. 38-41 and Chase §§12-24.

(b) Circumstances

Beyond the mere consideration of the type of default, a court likely will look at the circumstances of the lease in determining the importance of the provision breached by the tenant. For example, in a shopping center lease with an anchor tenant, the landlord often puts great importance on the covenant to conduct business in a particular way in order to draw in other tenants. See Halper, p. 42. Although the tenant may be current in rent payments, a breach of the covenant to conduct business in a particular way is considered to be material by the landlord. Id.; see, e.g., Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C.App. 650, 464 S.E.2d 47 (1995)(breach of obligation to open and operate department store at shopping center for seven years).

(c) Substantial Harm

Often, the breach will be deemed material if the Landlord is likely to suffer substantial harm.

> Courts have held that a material default arises from a tenant's failure to perform obligations which, if not performed by the tenant, would result in the loss of the landlord's estate in the premises, a violation of a mortgage, a violation of a legal requirement, or an impediment to a mortgage or sale of the property.

Halper, p. 43. For example, substantial harm may be found when a violation of a legal requirement has resulted in the issuance of an official notice which could interfere with any mortgage, loan or sale. Halper, p. 44. Often, a tenant's failure to carry any or sufficient fire insurance coverage is deemed material because of the substantial harm that the landlord faces if the premises are destroyed. Halper, p. 45.

(d) Other Considerations

Even if the breach appears material in all respects, a court still may find a waiver of the landlord's right to terminate if forfeiture is deemed unfair or unconscionable. See cases collected in Milton R. Friedman, Friedman on Leases, §16.5, n. 148 (4th ed. 1997) [hereinafter referred to as "Friedman"].

2. Two Methods of Dispossession

a. Self-Help

Often, landlords wish to take matters into their own hands and dispossess tenants without legal process. Although such actions are quick, inexpensive and effective in sending a message to the tenant, they are also fraught with danger.

(1) Common Law History and Concerns

In Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), the North Carolina Supreme Court explained the common law history of a landlord's right to self-help dispossession of a tenant:

> At early common law, a lessor was permitted to reenter leased premises and use necessary force, not amounting to death or bodily harm, to take possession. In 1381, however, Parliament enacted the statute of Forcible Entry, 5 Richard II stat. 1, c. 8 making forcible entry without legal process a crime.
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> In England it was held that, while the use of necessary force may be a crime under the forcible entry statute, a dispossessed tenant still had no civil remedy in the absence of excess force. In most jurisdictions in this country, including North Carolina, statutes similar to that of 5 Richard II were enacted, and the various constructions placed upon the statutes in the states have produced at least three distinct approaches to the question of self-help evictions.

Spinks, supra (citations omitted). For a discussion of different approaches to the question of self-help, see P.A. Agabin, Right of a Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process, 6 A.L.R.3d 177 (supp. 1997)(approaches include: (i) no right of self-help repossession; (ii) right of self-help repossession so long as it is peaceful; and (iii) right of self-help repossession which includes reasonable force).

The concern over the right to self-help repossession was summarized by Oliver Wendell Holmes:

> Law, being a practical thing, must found itself on actual forces. It is quite enough, therefore, for the law, that man by an instinct which he shares with the domestic dog, and of which the seal gives the most striking example, will not allow himself to be dispossessed, either by force or fraud, of what he holds, without trying to get it back again . . . . As long as the instinct remains, it will be more comfortable for the law to satisfy it in a more orderly manner, than to leave people to themselves.

Oliver W. Holmes, Jr., The Common Law, p. 213 (1881); see Lindsey v. Normet, 405 U.S. 56, 71 (1972) ("The landlord-tenant relationship was one of the few areas where the right to self-help was recognized by the common law of most States, and the implementation of this right has been fraught with violence and quarrels and bloodshed.").

(2) North Carolina Position

In the context of a residential lease, the North Carolina Supreme Court stated:

> It seems clear to us, then, that this state recognizes the right of a lessor to enter peacefully and repossess leased premises which are subject to forfeiture due to nonpayment of rent.

Spinks, supra. Immediately after the Supreme Court's ruling in Spinks, the Legislature banned self-help repossession in residential leases by enacting the Ejectment of Residential Tenants Act. G.S. § 42-25.6 (1994) (providing that the summary eviction procedures of Article 3, Chapter 42A are the proper vehicle for a tenant's eviction).

Nevertheless, since the Supreme Court's ruling in Spinks, there has been no legislation or case law stating that self-help repossession by landlords is prohibited in commercial leases. There is no reason to think that the right to peaceful dispossession, which was recognized in Spinks, cannot be utilized in the context of a commercial lease. The distinction between the acceptance, or lack thereof, of self-help dispossession in residential and commercial contexts may be summarized best as follows:

> In the commercial area, on the other hand, the courts and Legislature of North Carolina appear quite willing to allow the parties to a lease to determine their legal rights and obligations pursuant to the rules of property and contract law alone. This is so because commercial lessors and lessees negotiate and bargain for their leases at arm's length with no inappropriate inequality of bargaining power.

Webster, §12-1, p. 398.

In a May 4, 2004 opinion, the North Carolina Court of Appeals affirmed a judgment in favor of a tenant damaged by a landlord who utilized self-help. Zubaidi v. Earl L. Pickett Enterprises, Inc., 164 N.C. App. 107, 595 S.E.2d 190 (2004). The tenant alleged that the landlord was wrong because there had not been any default or notice and opportunity to cure. There was no argument that self-help repossessions are impermissible. It is interesting to note that the Court of Appeals stated as follows: "Plaintiffs presented evidence to show the lease/purchase agreement required [landlord] to provide notice of default and an opportunity to cure prior to exercising any right to self-help." Id. One might find that statement as an indication of the Court of Appeal's acceptance of the concept of self-help repossession.

(3) Essential Requirements to Be Followed by Landlords

A prerequisite to self-help repossession is the entitlement to immediate possession as provided for expressly in a lease or pursuant to G.S. §42-3. Upon a breach of a covenant and/or condition, the lease must explicitly permit forfeiture or a right of reentry for the landlord. Couch, supra. Otherwise, a landlord must rely upon G.S. §42-3 for payment defaults.

In light of the recognition that a landlord may utilize peaceful self-help measures in repossessing leased premises, the landlord must give serious consideration to what is and is not peaceful. In Spinks, the North Carolina Supreme Court provided the following guidance:

> We therefore hold that while a landlord is permitted to use peaceful means to reenter and take possession of leased premises subject to forfeiture, he may not do so against the will of the tenant; and objection by the tenant elevates the reentry to a forceful one, and the landlord's sole lawful recourse at that time is to the courts.

Spinks, supra. In sum, a landlord may not utilize self-help repossession if the tenant objects to the landlord's efforts (i.e., the efforts are against the will of the tenant).

(4) Risks

The landlord that exercises self-help repossession while not actually entitled to such a remedy (due to non-material breach, waiver, noncompliance with lease notice requirements, etc.) or in a manner deemed forceful submits itself to significant risks. The legal risks for the landlord can be summarized as follows:

- Damages for the breach of the implied covenant of quiet enjoyment. Marina Food Associates, Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990) (A lease includes the implied covenant of quiet enjoyment; where a lessee has been evicted, the covenant of quiet enjoyment has been breached).

- Damages for conversion. Id. ("Conversion is the unauthorized assumption and exercise of right of ownership over goods or personal property belonging to another or to the alteration of their condition or the exclusion of the owner's rights"; "The essence of the conversion being wrongful deprivation of an owner's property by another, [lessor's] actions in denying [lessee] access to its property was sufficient to support the jury's verdict as to conversion"); see also Taha v. Thompson, 120 N.C. App. 697, 463 S.E.2d 553 (1995)(same).

- Damages for trespass. Taha, supra ("To establish a trespass claim, plaintiff must prove that (1) plaintiff was in possession of the land at the time of the alleged trespass; (2) defendant made an unauthorized entry on the land; and (3) plaintiff was damaged by the alleged invasion of his possessory rights . . . . Plaintiff's evidence shows that a locksmith under defendants' instruction entered onto the leased premises without plaintiff's authorization and attempted to change the locks . . . .We find this issue should have been submitted to the jury as well").

- Damages for unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. Taha, supra (conversion and trespass by a landlord can constitute an unfair and deceptive trade practice).

The Court in Marina set forth the scope of damages to which a tenant might be entitled upon a wrongful eviction:

> A breach of a lease agreement by the lessor may give rise to a claim for damages by the lessee . . . . It is well settled that a tenant may recover damages that proximately result from a wrongful eviction . . . . A tenant's general damages in such a case are the value, at the time of the eviction, of the unexpired term, less any rent reserved . . . . However, a tenant's recovery is not limited to the value of the leasehold interest only, but may also include compensatory damages for pecuniary losses proximately resulting from the eviction, including conversion of personal property and, in the case of a business, loss of profits when such loss is ascertainable to a reasonable degree of certainty.

Id.

(5) Practical Advice

Although dispossession via summary ejectment presumably can be based on "any act" that violates a lease provision, see G.S. §42-3, a cautious landlord may want to limit self-help repossession to defaults involving the failure to pay rent. In light of the Supreme Court's statement that a landlord may enter peacefully and repossess these premises "which are subject to forfeiture due to nonpayment of rent," self-help repossession based on other type of defaults, even if material, may have no authority to support it. Spinks, supra (emphasis added).

Should a landlord be bold enough to seek self-help repossession upon other types of breaches of the lease agreement, the landlord may want to at least make sure that the breach relied upon is a material breach. Although not expressly required by the courts of this state, the inferences made by our courts and the weight of authority support a materiality consideration.

In order to exercise self-help repossession without any objection from the tenant, which would terminate the right to self-help repossession, the landlord should only exercise self-help repossession while the tenant is absent unless the landlord reasonably expects that the tenant will not object.

There is authority that the tenant's absence should not be induced by deception. Absence induced by deception may amount to forcible reentry. See Pelavin v. Misner, 241 Mich. 209, 217 N.W. 36 (1928).

The procedures utilized by the landlord in Spinks may provide some guidance to landlords:

- Although not essential, a landlord may provide written notice to the tenant that the Landlord intends to padlock the premises.
- The landlord should attempt to determine whether anyone is present on the premises before padlocking.
- Notice of the padlocking may be posted on the premises and the landlord may attempt to notify the tenant personally.
- Landlord's written notice should notify tenant that tenant will be provided reasonable access to personal property upon request.
- If the tenant requests personal property from the premises, the tenant should be permitted reasonable access to enter and remove the property.
- In order to protect itself against conversion claims, the landlord may want to make a written and video inventory of the contents of the premises in order to avoid a later claim that some of tenant's personal property is missing.

Finally, an interesting issue is whether the landlord must discontinue self-help repossession and return the premises when an objection is made after the padlocking has already occurred. Arguably, at that point, the lease has been terminated and the tenant's possession has ended. Consequently, the tenant would no longer enjoy a right of possession.

b. Statutory Repossession/Summary Ejectment

An alternative to self-help repossession which is devoid of self-help repossession's inherent risks is statutory repossession under the summary ejectment statutes. N.C. Gen. Stat. § 42-26 et seq. G.S. 42-26 provides, in pertinent part:

> Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of tenant or lessee who holds over and continues in the possession of the demised premises or any part thereof, without the permission of the landlord, and after demand for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:
>
> (1) When a tenant in possession of real estate holds over after his term has expired.
>
> (2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.
>
> (3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of he crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

The principal benefit of summary ejectment action is that the landlord can quickly regain possession of the premises in an inexpensive and simplified legal proceeding.

(1) Preserving Rights to Damages

The scope of remedies available to a landlord in a summary ejectment action is summarized by the Court of Appeals in Holly Farm Foods, Inc. v. Kuykendall, 114 N.C. App. 412, 442 S.E.2d 94 (1994):

> The summary ejectment statute, N.C. Gen. Stat. § 42-26, provides three separate remedies for the lessor: (i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award for tenant's occupation of the premises after the cessation of the estate.

Id. (quoting, Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 86, 398 S.E.2d 628, 632 (1990)).

If the landlord is interested in recovering future rents for the remainder of the lease term, the landlord must consider several points. First, summary ejectment terminates the lease and there is no liability for future rent absent a contrary provision in the lease. Holly Farm, supra. Second, assuming that the lease includes a provision permitting recovery of future rents upon termination of the lease, a landlord's recovery of damages in the summary ejectment action is limited to the jurisdictional amount of $4,000. Third, if the landlord seeks damages in the summary ejectment action up to the jurisdictional amount, the doctrine of res judicata will bar any later action for additional damages. Chrisalis, supra (res judicata barred action brought in

superior court by commercial lessor for breach of lease, seeking recovery of unpaid rent, taxes, and maintenance fees, including payments accruing subsequent to lessor's repossession of the premises, because lessor previously had recovered back rent and other damages in summary ejectment proceeding.)

Consequently, if a landlord desires to regain possession and recover damages in an amount greater than $4,000, the landlord should merely use the summary ejectment action to regain possession. N.C. Gen. Stat. § 42-28 permits a landlord to bring a separate action to recover damages after possession of the premises has been regained by way of a summary ejectment proceeding. The statute expressly provides, in pertinent part:

> "[T]he plaintiff may claim rents in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee not to exceed the jurisdictional amount established by G.S. 7A-210 (1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery."

G.S. §42-28; see Chrisalis, supra ("Plaintiff is not compelled to seek in its complaint for summary ejectment the amount of past due rent or any amount for damages.").

(2) Procedural Considerations

With respect to summary ejectment proceedings, there are a number of procedural considerations that are worth summarizing. For example:

- Demand. G.S. §42-26 requires that demand be made of tenant for the surrender of the premises before an actual removal can be accomplished pursuant to the summary ejectment statute.

- Private Water and Sewer Default. G.S. §42-26(b) excludes certain private water and sewer defaults as a basis for termination of the lease.

- Timing of Hearing. G.S. §42-28 provides that the tenant should appear to answer the complaint at a time not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays. Note well the special statute defining "legal holidays" in North Carolina, G.S. §103-4.

- Service of Summons. G.S. §42-29 sets forth unique provisions for service of the summons and summary ejectment complaint. The officer receiving the summons shall mail a copy of the summons and complaint to the defendant at defendant's last known address in a stamped, addressed envelope provided by the landlord. The officer may telephone the tenant to arrange for service of process. As a last resort, the officer may affix copies to some conspicuous part of the premises.

- Trial by Magistrate. G.S. §42-31 provides for trial by magistrate without a jury.

- Rent and Costs Tendered by Tenant. G.S. §42-33 provides, in pertinent part, that if the "tenant, before judgment given in such action, pays or tenders the rent due and the cost of the action, all further proceedings in such action shall cease."

- Staying Execution During Appeal. G.S. §42-34 provides, in pertinent part, that upon appeal to the district court, "[i]t shall be sufficient to stay execution of a judgment for ejectment that the defendant appellant assign an undertaking that he will pay into the office of the Clerk of Superior Court the amount of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below." Subdivision (d) provides a form for a "Bond to Stay Execution on Appeal to District Court."

- Obtaining Rent While On Appeal. Pursuant to G.S. §42-34(e), the landlord can obtain the rental payments paid to the Clerk by making application to the Clerk.

- Failure of Tenant to Pay Rent to Clerk During Appeal. Pursuant to G.S. §42-34(f), if the tenant fails to make payment within five days of the due date according to the undertaking and order staying execution, the landlord may apply for the issuance of execution on the judgment for possession.

- Restoring Possession to Tenant. G.S. §§42-35 and 42-36 provide that if the proceedings that dispossess tenant are quashed or reversed, the tenant may regain possession of the premises and recover damages for his removal.

- Execution of Writ of Possession. G.S. §42-36.2 sets forth the requirements for when and how a sheriff may remove tenant's personal property and when and how a sheriff may store property. A writ of possession must be executed within seven days of when the sheriff receives it. Before the tenant's personal property is removed, the sheriff shall give the tenant notice of when the writ will be executed. If the tenant will not take its property, the sheriff may deliver the personal property to a storage warehouse and may require the landlord to advance the delivery costs and cost of one month's storage.

(3) Practical Considerations

- Documents to Use at Trial. The landlord should bring at least the following for use at the summary ejectment trial: copy of the lease; correspondence relating to notice of default, demand for surrender and termination of lease or right to possession; and documentation of payment history.

- Witnesses at Trial. The landlord needs witnesses with personal knowledge of the lease, the tenant's payment history (or other default relied upon by landlord), and landlord's correspondence to tenant.

B. Monetary Damages

Upon the breach of a lease by tenant, landlords often seek monetary damages as their exclusive remedy or in combination with dispossession. The damages sought usually include past due rent, present damages related to repairs and restoration of the premises, and claims for future rent covering the remainder of the lease term.

1. Back Rent

Obviously, the landlord is entitled to compensation for unpaid back rent. Kearns v. Gay Apparel Corp., 232 F.Supp. 475 (M.D.N.C. 1964), aff'd per curiam, 341 F.2d 297 (1965); Friedman, §16.3, p. 1090, n. 36.

2. Present Damages

Breach of a lease agreement entitles a landlord to recover all present damages, including damages for repair and restoration of the premises, reasonably flowing from the breach. Kearns, supra.

3. Future Rent

a. Requirements of Explicit Lease Language

As stated earlier, after the lease has been terminated, a landlord cannot recover future rent unless the lease explicitly provides for such recovery. See Holly Farm, supra (even though the lease has been terminated through a summary ejectment proceeding, landlord can recover future rent if there is a provision in the lease for payment of future rent upon termination of the lease). In addition, if a notice of termination is sent, it should state that it is without prejudice to any rights and causes of action the landlord might have by virtue of the express terms of the lease. See Kearns, supra (when lease expressly provides for payment of future rent upon termination and landlord's notice of termination stated that it is "without prejudice to any rights and causes of action...," landlord is entitled to future rent after termination if such damages are" fairly within contemplation of the parties and capable of being ascertained with a reasonable degree of certainty").

b. Theory

Because the lease has been technically terminated when the tenant has been dispossessed, the recovery of future rent is a claim for damages rather than a claim for rent. Holly Farm, supra.

c. Duty to Mitigate

(1) General Rule

"[T]he law in North Carolina is that the nonbreaching party to a lease contract has a duty to mitigate his damages upon breach of such contract." Isbey v. Crews, 55 N.C. App. 47, 284

S.E.2d 534 (1981). "Thence, when the tenant abandons the lease premises and fails to pay rent, the landlord, recovers only those damages which it could not with reasonable diligence avoid by reletting the premises." Id.

The breaching party bears the burden of proving a failure to mitigate. Id.

It is important to note that the duty to mitigate may take into account the "peculiar advantages the lessor contracted for under the lease, and any quantifiable disadvantages which the lessor may suffer from having as his tenant someone other than the lessee with whom [it] contracted...." Id.

For an interesting recent case in which the Court of Appeals held that there was no duty to mitigate based upon the facts of the case, see Tripps Restaurants of North Carolina, Inc. v. Showtime Enterprises, Inc., 595 S.E.2d 765 (N.C. App. 2004) (lessor not required to mitigate damages when tenant "left the property in such poor condition that it would have cost several hundred thousand dollars just to restore it to a condition in which it could be rented" and only a short time remained on the lease).

(2) Reasonableness of Effort

There is little authority in North Carolina pertaining to what constitutes reasonable diligence. Nevertheless, the Supreme Court has recognized that circumstances may exist where a landlord may not be able to relet the premises after exercising reasonable efforts and, therefore, the tenant would not be entitled to any credit for fair rental value. Weinstein v. Griffin, 241 N.C. 161, 84 S.E.2d 549 (1954) ("[A]fter due diligence the plaintiffs might not be able to relet immediately or they may not be able to find a tenant who would pay the reasonable rental value for the remaining part of the term, in which event the defendants would get no credit at all."). For examples of cases from other jurisdictions where the reasonableness of the landlord's mitigation efforts was at issue, please see the cases collected in footnotes 16 through 28 in Friedman, §16.303. A summary of the conclusions drawn from those collected cases is as follows:

- The reasonableness of asking for a higher rent depends on if it coincides with market value;
- The reasonableness of renting at a lower rate depends on if that is all that can be obtained, and there may be a factual issue as to whether the landlord rented for enough;
- It is probably reasonable to first rent another space that was vacant prior to the tenant's termination of the premises;
- It may be reasonable to refuse a reletting if it is for a different use;
- It may be reasonable to refuse a reletting for a term that goes beyond the original tenant's term;

- It may be reasonable to refuse a reletting if the new tenant requires additional property.

From a practical standpoint, there are a number of things that a landlord can do in an effort to mitigate damages:

- List the space with a commercial real estate broker. If brokerage is done in-house, document that all relevant employees are aware that the space is available.

- Advertise the space and keep records of advertising by retaining copies of ads.

- Keep the space clean and ready to lease.

- Document all prospective tenant inquiries and discussions pertaining to leasing terms.

Carl F. Dixon, The Landlord's Duty to Mitigate, The Practical Real Estate Lawyer, p. 20 (January 1992).

d. The Measure of Damages

The measure of future damages after a tenant has been dispossessed is:

> Amount of rent the lessor would have received in rent for the remainder of the term, less the amount received from the new tenant.

Holly Farm, supra.

The measure of future damages takes into consideration the duty to mitigate. If the landlord does not exercise reasonable diligence, its recovery is limited to the difference between the contract rate and the fair market value of what it should have received had it used reasonable diligence to mitigate. Isbey, supra. If the landlord does exercise reasonable diligence by reletting, its damages are the difference between the contract price and the actual amount received from reletting. Id.

e. Liquidated Damages

Sometimes, a lease contains a liquidated damages provision that is intended to apply if the lease is prematurely terminated. Liquidated damages, if in the nature of a penalty, are not favored by the law. Weinstein v. Griffin, 241 N.C. 161, 84 S.E.2d 549 (1954). Nevertheless, a liquidated damages provision will be upheld if its application is not less favorable to the tenant than the rule of law would impose in the absence of any provision for liquidated damages. Id. (liquidated damages calculated by discounting the value of the difference between the contract rate and the reasonable rental value).

C. Injunctive Relief

With respect to the availability of injunctive relief for a breach of a lease, the following conclusions can be drawn from Asheville Mall, Inc. v. Sam Wyche Sports World, Inc., 97 N.C. App. 133, 387 S.E.2d 70 (1990)(landlord brought action to enjoin tenant from violating lease by closing store in future):

- Irreparable injury must be proven and damages must not be readily obtainable;
- The injury should be so continuous and frequent that no reasonable redress can be heard in a court of law;
- The violative acts must be continuing at the time of the institution of the suit, or there must be a probability that they will be resumed; and
- The damage must be real and immediate.

Id.

D. Specific Performance

Generally, courts are reluctant to grant specific performance to enforce lease covenants because the landlord can usually sue for damages or because the court is wary of the day-to-day supervision required to ensure compliance. Friedman, §10.501(a)(3), p. 651.

IV.

The Tenant's Defenses To The Eviction Action

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A. Tenants Defenses to Breach and Forfeiture

In an effort to avoid forfeiture, a tenant may contend that a breach does not exist or concede that the breach exists, but that it was excused.

1. No Breach Exists

a. Strict Construction

If there is any ambiguity with respect to the lease term allegedly breached, a tenant may argue that strict construction of the provision does not provide for a breach under the circumstances. "An ambiguous clause in a lease is construed in favor of the lessee, particularly where the lease was drafted by the lessor." See Marina Food Associates, Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824 (1990); but see Coulter v. Capitol Finance Co., 266 N.C. 214, 146 S.E.2d 97 (1996) ("It is also a rule of construction that an ambiguity in a written contract is to be against the party who prepared the writing .... Here, the lease was prepared by the attorney for the lessee. Consequently, the ambiguous language . . . should be construed in favor of the lessor.").

b. Substantial Conformity

Another likely contention of a tenant is that the tenant did not breach the lease because it "substantially conformed" with the lease obligation.

2. Breach Existed, but the Breach is Excused

Even if the tenant has breached the lease, the tenant may argue that the breach was excused due to waiver of the breach by the landlord or due to other equitable considerations.

a. Waiver

"Generally, a waiver is defined as an intentional or voluntary relinquishment of a known right or such conduct as warrants inference of the relinquishment of such right." See Friedman, § 16.501, p. 1138. The rule in North Carolina has been stated as follows:

> It is the generally accepted rule that if the landlord receives rent from his tenant, after full notice or knowledge of the breach of a covenant or condition in his lease, for which a forfeiture might have been declared, such constitutes a waiver of the forfeiture which may not afterwards be asserted for that particular breach, or any other breach which could prior to the acceptance of rent ....

Raleigh City Limits, Inc. v. Sandman, 49 N.C. App. 107, 270 S.E.2d 552 (1980) (quoting Winder v. Martin, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922)).

Obviously, in light of the requirement that the relinquishment of a right must be intentional by the landlord, acceptance of rent when the landlord is not aware that the tenant is in default is not waiver. Friedman, §16.501, p. 1142.

Two rationales support the doctrine or waiver. First, because the tenant has relied upon the continuous acceptance of late payments, it is unfair to the tenant for the landlord to suddenly require strict compliance with the release provisions. Friedman, §16.501, p. 1144. Second, acceptance of rent after declaration of forfeiture actually is a recognition of the continuance of the term of the lease which is inconsistent with forfeiture. See Fairchild Realty Co. v. Spiegel, Inc., 246 N.C. 458, 98 S.E.2d 871 (1957); Friedman, §16.501, p. 1139.

A practical criticism of the rule of waiver when a landlord's loss may be heavy has been explained as follows:

> [T]o avoid any loss landlord must postpone his receipt of rent, the lifeblood of real estate operation, with its possible ultimate uncollectibility. In view of the fact that it is the tenant who is at fault in these situations, and not the landlord, it is a curious inversion or a topsy-turvy situation with the risk of any loss or hindrances on the party in good standing.

Friedman, §16.503, p. 1157.

Many leases include a disclaimer of waiver provision that essentially provides that the receipt of rent by the landlord with knowledge of any breach of the lease by tenant shall not be deemed a waiver of such breach. Although there are no North Carolina cases known to be on point, other jurisdictions provide examples of cases in which such a provision is both enforced and not enforced. See Friedman, §16.502, p. 1154, n. 10 (collecting cases where waiver of disclaimer provision was enforced) and n. 11 (collecting cases where provision was not enforced). The uncertainty of the enforceability of such provision is amplified by fact that a court could find that the disclaimer of waiver provision may itself be waived. Friedman, §16.502, p. 1155.

Although waiver may prevent forfeiture of a lease, waiver does not release the tenant from its contractual obligations. Fairchild Realty Co., v. Spiegel Inc. 246 N.C. 458, 98 S.E.2d 871 (1957); Friedman, §16.501, p. 1149.

> Landlord's waiver is limited to loss of a right to forfeit the lease. Forfeiture, followed by possessory proceedings, is usually landlord's quickest and most effective remedy. Waiver does not deprive him of other rights under the lease. He may still have a right to damages for the act of omission that was subject of waiver.

Friedman, §16.501, p. 1150. "A landlord who waived a right of entry by accepting rent with knowledge of tenant's nonpayment of taxes did not thereby release a claim that tenant pay these taxes." Friedman, §16.501, p. 1151 (citing Conger v. Duryee, 90 N.Y. 594 (1882)).

There are numerous examples of cases in North Carolina in which a landlord has waived a default by accepting rent. See Raleigh City Limits Inc., v. Sandman, supra (landlord accepted rent payments for the month tenant was considered to be in default; court found waiver); Fairchild Realty, supra (waiver by acceptance of rent while lease was considered in default due to assignment to which landlord did not consent).

In addition, a landlord may waive his right to forfeiture when it takes no action after giving notice of default and an ensuing termination if the default is not cured. Friedman, §16.501, p. 1145.

A landlord may be able to avoid a later finding of waiver, after having previously accepted late rent payments, by providing the tenant with a written warning and notice that the terms of the lease will be strictly enforced and that no more late payments will be tolerated. Obviously, the landlord will have to be careful not to waive this effort by subsequent inaction.

b. Equitable Considerations

Courts may excuse a breach because forfeiture would be "unconscionable," Charlotte Housing, supra, or simply because fairness militates against the forfeiture.

c. Failure to Follow Procedures Set Forth in Lease

Strict construction of the lease and abhorrence of forfeiture might lead a court to excuse a breach if the landlord fails to follow the notice and/or cure requirements set forth expressly in the lease. If a lease expressly provides for notice of default and termination, then it must be provided. Kinnard v. Mecklenburg Fair, Ltd., 46 N.C. App. 725, 266 S.E.2d 14 (1980), aff'd 301 N.C. 522, 271 S.E.2d 909 (1980) (landlord breached lease by locking out the tenant without providing ten days notice required by the lease). Indeed, notice "must be given in strict compliance with the contract as to both time and contents." Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988). Moreover, notice of termination must be clear and unequivocal that the landlord has elected to terminate the lease. Id. To be clear and unequivocal, the landlord must state that it is "terminating" the lease or right to possession rather than "electing to request that tenant vacate the premises." Id.

In the recent case of ARE-100/800/801 Capitola, LLC v. Triangle Laboratories, Inc., 144 N.C. App. 212, 550 S.E.2d 31 (2001), the landlord was precluded from ejecting the tenant because landlord's notice to tenant was equivocal. The landlord merely notified the tenant that upon a failure to cure the default, the landlord will "initiate curative remedies under the Lease and the law."

3. Breach Not Material

See earlier materiality discussion at p. III-4 and case of Loomis v. Hamerah, 140 N.C. App. 755, 538 S.E.2d 593 (2000) ("To the extent there has been a breach of any provision of the Lease, not every breach 'justifies a cancellation and rescission' of the contract. To justify

termination of a lease, the breach 'must be so material as in effect to defeat the very terms of the contract.'").

4. Constructive Eviction/Breach of Covenant of Quiet Enjoyment

Tenants sometimes defend themselves by alleging the landlord is in default under a theory of constructive eviction and/or breach of the covenant of quiet enjoyment. This usually is a futile defense to an eviction action. Because the tenant is trying to avoid eviction, this defense necessarily is asserted while the tenant is still in possession of the premises. The problem for the tenant is that a tenant must abandon the premises to assert constructive eviction. Marina Food Assoc., Inc. v. Marina Restaurant, Inc., 100 N.C. App. 82, 394 S.E.2d 824, disc. rev. den., 327 N.C. 636, 399 S.E.2d 328 (1990). In a very recent unpublished decision, a tenant failed in its argument of constructive eviction due to the landlord's alleged failure to prevent criminal activity. Charlotte Eastland Mall, LLC v. Sole Survivor, Inc., 604 S.E.2d 367, 2004 WL 2339994 (N.C. App. Oct. 19, 2004).

5. Implied Warranty of Habitability

The defense of breach of implied warranty of habitability is not available to tenants in commercial leases. K & S Enterprises v. Kennedy Office Supply Co., Inc., 135 N.C. App. 260, 520 S.E.2d 122 (1999) (doctrine of implied warranty of habitability does not apply in commercial leases).

6. Duty to Warn

It is conceivable that a tenant might raise a defense related to a duty to warn of unknown health hazards. A landlord "does not have a duty to warn a tenant of a defect on the premises known to the tenant, and the landlord ordinarily cannot be held liable to the tenant for a defect the tenant knew about when the tenant leased the premises." Cameron v. Merisel, Inc., 163 N.C. App. 224, 593 S.E.2d 416 (2004). However, the Court in Cameron noted there are several exceptions including where:

a. a landlord leased the premises in a ruinous condition;

b. there was a contract that obligated a landlord to repair the premises;

c. a landlord authorized a wrong; and

d. somewhat similarly, where a landlord exercised control over the premises despite the tenant's occupancy.

Id.

7. Retaliatory Eviction

The defense of retaliatory eviction can be found in G.S. §42-37.1. It is unclear whether retaliatory eviction is a defense that is available to commercial tenants. G.S. §42-37.1(a) appears to focus on residential tenants. However, G.S. §42-37.1(b) seems to speak generally to any and all summary ejectment actions.