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NORTH CAROLINA'S NEW LANDLORD-TENANT LAW

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THIS MEMORANDUM deals with some of the legal issues that may arise under North Carolina's new landlord-tenant law (Ch. 770, H 949, codified as Articles 5, G.S. Ch. 42). A copy of the new law appears on pages 10-12.

This memorandum should be read in conjunction with the earlier memorandum 1977 Legislation Affecting Civil Duties of Magistrates, issued in September, 1977, which explained the provisions of the law. The new law leaves many questions unanswered, and we will not be sure of its effect until the appellate courts interpret it. Magistrates and the chief district judge in each district may be well advised to determine the policies and procedures they will follow in hearing cases under this law. Footnotes are included for anyone who wishes to read some of the cases.

I want to thank Ted Fillette, an attorney with the Mecklenburg Legal Aid Society, and Adrienne Fox, a clinical professor at Duke Law School, for their help in preparing this memorandum.

HISTORICALLY, LANDLORD-TENANT LAW has been based on the premise that a lease is a property transaction conveying to a tenant an interest in land for a specified period of time. Treating a lease as an interest in real estate made sense in an agrarian society when a tenant leased land for farming. Today, however, a tenant who rents a residential dwelling is interested not in the land but in living space, utilities, facilities, and services suitable for occupation. Recognizing this change, many courts over the past decade have begun interpreting the residential lease as a contract rather than a transfer of property; and they have recognized in a contract to lease a dwelling unit an implied warranty by the landlord that the

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premises are habitable. North Carolina courts have not recognized this implied warranty,[1] but now the General Assembly has imposed the warranty by statute. G.S. 42-42(a)(2) requires the landlord to make all repairs and do whatever is necessary to put premises in a fit and habitable condition and keep them that way. Because the statute does not define "fit and habitable," the magistrate will have to determine whether the premises meet the requirement on the basis of the facts of each case. Some courts from other states have said that habitability is measured by the standards set out in the applicable housing codes: a dwelling is habitable if it is in substantial compliance with the applicable codes.[2] Minimal violations are not enough; the defect must affect habitability. Another standard used is whether the defect renders the dwelling wholly or partially uninhabitable in the eyes of a reasonable person. For instance, if an apartment has a leak in the roof in one bedroom, that leak probably affects the habitability of that room and the landlord's warranty is breached. Courts have listed several factors that should be considered in determining whether the breach is substantial enough to render the premises unsafe or unsanitary and thus unfit for human habitation, including: (1) whether the applicable building or housing codes or sanitary regulations have been violated; (2) whether the defect or deficiency affects a vital facility; (3) the potential or actual effect of the defect on safety and sanitation; (4) the length of time the defect persisted; (5) the age of the structure; and (6) whether the tenant was responsible for the defective condition.[3]

If the landlord breaches any of his four obligations under G.S. 42-42(a), the tenant has several remedies. G.S. 42-44(a) states that any right or obligation of the landlord-tenant law is enforceable by civil action, including recoupment, counterclaim, defense, set-off, and any other legal or equitable remedies.

One possible remedy is for the tenant to bring an action for money damages for the landlord's breach of his obligation. The tenant would be entitled to the normal measure of damages for breach of contract. A party injured by a breach of contract is entitled to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. He is entitled to recover all damages that were reasonably foreseeable by the parties and can be determined with reasonable certainty. The usual contract damages for breach of warranty is the difference between the fair rental value of the premises as warranted and the

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1. Knuckles v. Spaugh, 26 N.C. App. 340 (1975); Thompson v. Shoemaker, 7 N.C. App. 687 (1970).

2. See, e.g., Jarvins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Green v. Superior Court, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974).

3. Mease v. Fox, 200 N.W.2d 791 (Iowa 1973); McKenna v. Begin, ___ Mass. ___, 362 N.E.2d 548 (1977); Berzito v. Gambino, 63 N.J. 460, 308A.2d 17 (1973).

fair rental value of the premises with the defects plus any special damages proved (hereafter called fair-rental-value damages.)

Instead of the fair-rental-value damages, some courts in other states have used contract-price damages (the difference between the contract price and the fair rental value of the premises with defects) as the measure of damages; still other courts have used the percentage reduction of use (the court determines the percentage that the use and enjoyment of the premises is diminished by the defects and reduces the rent by that percentage) to measure damages.

North Carolina courts will almost certainly use the fair-rental-value measure of damages, since the State Supreme Court has used that measure in cases in which the landlord agreed by contract to make repairs and failed to do so[4] and in cases in which a builder-vendor breached his warranty to provide a purchaser with a house constructed in a workmanlike manner.[5] The court pointed out that use of the contract-price measure of damages would be unfair. Under that measure, the lessee would be penalized if he made a good bargain and rewarded if he made a bad one. The Court said that the tenant should not be deprived of his bargain if he obtains an advantageous contract in which the contract price is less than the fair rental value. Also, if the contract-price measure is used in the case in which the contract price is less than the fair rental value, the lessor is encouraged to breach his obligation. For example, assume that the tenant rents a dwelling for $100 a month. The fair rental value of the dwelling is $150 a month. The landlord fails to make certain required repairs, and the fair rental value of the premises with the defects is $100 a month. Under the contract-price measure of damages, the tenant is not entitled to any damages. In this situation the landlord might be encouraged to breach his obligation to repair because he would suffer little or no damages for breach. Under the fair-rental-value measure, the tenant is entitled to damages of $50 per month.

Using the example above, what if the contract price is $200, a rate higher than the fair rental value? In that case the contract-price measure of damages is $100, and the fair-rental-value measure of damages is $50. If the contract price is used, the landlord is denied the benefits of having made a good bargain and the tenant receives more than compensatory damages.

In determining fair rental value of the dwelling as warranted and with the defects, the magistrate must depend on the testimony offered by the parties. Expert testimony is not necessary. In the absence of other evidence, the contract rent may be taken as the fair rental value of the premises as warranted.[6]

4. Brewington v. Loughran, 183 N.C. 558 (1922).
5. Hartley v. Ballou, 286 N.C. 52 (1974).
6. Brewington v. Loughran, 183 N.C. 558 (1922).

Sometimes the tenant may be able to prove special damages, such as loss of profits, when the damages are foreseeable and ascertainable. For instance, in one North Carolina case[7] a landlord who had contracted to make repairs failed to repair a roof on top of a reservoir, which resulted in less water collection in the reservoir than usual. The tenant operated a summer resort on the premises, and she ran out of water in the middle of the season. Her guests therefore left. The tenant wanted to introduce evidence of loss of profits; she could show her profits in past years and her bookings for the year in which the breach occurred. The court held that she could do so; the damage was reasonably foreseeable and could be proved with reasonable certainty.

The only notice required by G.S. 42-42 before the landlord's obligation is breached is that the tenant give the landlord written notice, except in emergencies, of needed repairs to electrical, plumbing, or other facilities or appliances; the statute requires no notice before the landlord's other obligations are breached. However, courts in other states that have adopted a warranty of habitability have required that the tenant give the landlord notice, either oral or written, and a reasonable time and opportunity to correct the defect before the landlord is liable for damages for any breach of his warranty of habitability that occurs after the tenant has begun living on the premises. It is likely that a notice requirement will be followed in North Carolina with regard to all four of the landlord's obligations.

Other states also allow the tenant to raise the landlord's breach of obligation as a defense to the landlord's action for summary ejectment for failure to pay rent. In Javins v. First National Realty Corp.,[8] the leading case on breach of warranty of habitability, the court held that at a trial for eviction for back rent due, the judge should consider the tenant's defense of breach of the landlord's obligation. If the judge determines that the landlord breached his obligation, he should determine the reduced rent due because of the breach. If all the rent claimed is due, the judge gives the landlord a judgment for possession and back rent owed; if partial rent is due, the tenant can pay it immediately or be evicted; and if no rent is due, the tenant can remain on the premises. For example, assume that the landlord and the tenant entered into a month-to-month tenancy for $150 per month. In mid-summer the air conditioner breaks down. The tenant does not pay rent for August. The landlord brings an action for summary ejectment, seeking possession and $150 damages for rent owed. At the trial, the tenant proves that the air conditioner broke in July, that he gave the landlord written notice that repairs were needed, and that the landlord did not make the repairs. He proves that the fair rental value of the premises without an air conditioner is $100 per month. If Javins is applied, the judge rules that the

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7. Cary v. Harris, 178 N.C. 624 (1919).
8. 428 F.2d 1071 (D.C. Cir. 1970).

tenant owes $100 in back rent. The tenant can pay the $100 immediately and avoid eviction. If the tenant cannot prove the landlord's breach of his obligation, the landlord is entitled to a judgment for eviction and $150 damages. However, North Carolina's statute provides that the tenant may not unilaterally withhold rent without a judicial determination of his right to do so. It is unclear what effect this prohibition has on the procedure authorized by Javins. It may be that if the tenant withholds rent, he can defend against damages only and not against eviction on the basis of the landlord's breach. In other words, in the case above, a magistrate would give the landlord a judgment for possession and only $100 back rent owed. On the other hand, the provision might be read to allow the tenant who guesses correctly and withholds the right amount of rent to continue in possession on the basis that he is not in default since no rent is due and owing. For example, in the cases above, if the tenant had withheld $50 and paid $100 rent, he could argue that he is not in default.

Rather than withholding rent, the tenant might more safely bring an action for rent abatement to recover the excess rent paid because of the landlord's breach and to seek an order allowing the lesser amount of rent to be paid until the landlord complies with the act. Say, for example, that the landlord and the tenant enter into a month-to-month tenancy with a monthly rent of $150. The furnace is broken; the landlord is given notice but does not repair. The tenant pays one month's rent and then brings an action to recoup the overpaid rent. He claims that the landlord breached his obligation to repair and that the fair rental value of the premises as warranted is $150 a month but with the broken furnace is $100 a month. If the magistrate finds that the warranty was breached and that the fair rental value as warranted is $150 and with the defect is $100, he can award $50 damages for recoupment of overpaid rent to tenant and authorize the tenant to pay rent of $100 until the landlord repairs the furnace. If the tenant proves that the fair rental value of the premises with the defect is $100, he is entitled to damages of $100 and an order to pay $50 rent until the furnace is repaired. Note that under the fair-rental-value measure of damages, if the contract price is less than the fair rental value as warranted, the tenant may be allowed to pay less rent than the fair rental value of the premises with the defect.

Another course authorized in other states is the remedy of repair and deduct, which allows the tenant to make needed repairs when the landlord does not and to deduct their cost from the rent. Most states allow this remedy only for minor repairs and limit the amount of money that can be spent on them. Without a limit on cost, the tenant could conceivably spend a year's rent by making major repairs to the premises. North Carolina case law has held that when a landlord has agreed in the lease to make repairs and fails to make needed repairs after notice and reasonable time to do so,

the tenant may make them and recover the cost in an action against the landlord for that purpose or on a counterclaim in an action for back rent.[9] Although there is precedent for using the remedy of repair and deduct in North Carolina, it is unclear whether the new law would prevent the tenant from deducting the cost of repairs from the rent. It may be that the statutory prohibition against unilaterally withholding rent bars deduction of repair costs from the rent and the tenant would have to pay the rent and sue for the cost of the repair. On the other hand, it would seem unreasonable to allow the tenant to repair but make him bring an action to recover the costs of repair rather than deduct them from the rent.

A tenant takes some chance in using the remedy of repair and deduct. For instance, if he repairs the plumbing and the landlord proves that it was the tenant himself who damaged the plumbing, the tenant will not be entitled to recover the costs of repair. Or say that the tenant claims that the landlord breached his warranty of habitability because there is a crack in the plaster of the living room wall and no covers over the electrical sockets. After notice and waiting a reasonable time for the landlord to make repairs and put the premises in a habitable condition, the tenant makes the repairs for $75. If, in trying the case, the magistrate finds that habitability of the premises was not affected by the crack in the wall and lack of electrical socket covers, and thus the landlord did not breach his obligation under the act, the tenant was not entitled to make the repairs and cannot recover their cost.

One issue that may be raised is whether the landlord must repair the premises if the damage was caused by the tenant. G.S. 42-43(a) provides that the tenant is obligated to not deliberately or negligently destroy or damage the dwelling or permit anyone else to do so and is responsible for any damage to the dwelling other than normal wear and tear caused by himself, his family, or any of his guests. If the tenant breaches these duties, his breach certainly does not impose on the landlord an obligation to repair. The landlord's obligation to repair is mutually dependent on the tenant's obligation not to deface or damage the property. Also, the general contract principle that one cannot benefit from his own wrong applies. Therefore, if the landlord proves that the tenant, his family, or his guests caused the damage, the tenant and not the landlord is responsible for the repair.

Another issue that may arise is whether the tenant can waive the landlord's obligation to repair and keep the premise habitable. The landlord might defend against an action for breach by arguing that the tenant by implication agreed to the breach by continuing

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9. Leavitt v. Twin County Rental Co., 222 N.C. 81 (1942); Jordan v. Miller, 179 N.C. 73 (1919).

to pay the rent when he knew about the defect. In fact, in Thompson v. Shoemaker[10] the North Carolina court followed that reasoning. G.S. 42-42(b) overrules Thompson by providing that the landlord is not released from his obligations by the tenant's implicit or explicit acceptance of the landlord's failure to provide premises that comply with the act. For example, the tenant's payment of rent when he knows of a defect does not relieve the landlord from his obligation to repair the defect. However, the landlord and the tenant may enter a written contract under which the tenant agrees to do specified work on the premises. That contract must be separate from the lease contract, must be entered into after the lease contract, must be written and must be supported by consideration other than renting of the dwelling.

ALL OF THE PRECEDING DISCUSSION has dealt with the situation in which the landlord breaches his obligations. The act also places obligations on the tenant: (1) He must keep the premises clean and safe, dispose of ashes and garbage in a clean and safe manner, and keep the plumbing fixtures clean; (2) he must not deliberately or negligently destroy the premises or knowingly permit anyone else to do so; and (3) he must comply with housing and building code obligations placed on tenants and be responsible for all damage to the unit caused by him, his family, or his guests. G.S. 42-43(b) requires the landlord to notify the tenant in writing of any breach except in emergency situations. Presumably, the tenant then has a reasonable opportunity to correct the breach before he is liable for damages. If he fails to correct the breach, the landlord can either sue him for money damages for breach of his obligation or make the repairs and sue the tenant for the costs. If the landlord sues for money damages for breach of the tenant's obligation, the measure of damages is the same as that for waste--the diminution in the value of the land or the difference in the value of the property immediately before and immediately after the injury to it. One issue that may arise is whether the landlord can evict the tenant for breach of one of these statory obligations. In my opinion, he can do so only when the lease between him and his tenant provides (1) that breach of any of the obligations set out in G.S. 42-43(a) will result in forfeiture and (2) that he can re-enter and evict when one of these conditions is breached.

Finally, a major issue raised but not answered by the new law is whether the tenant can raise retaliatory motive as a defense to an action for summary ejectment. To put it another way, can the landlord be prevented from evicting the tenant in retaliation for the tenant's forcing the landlord to comply with the act? For example, if the tenant who has a month-to-month lease brings an action against the landlord for breach of warranty, can the landlord be stopped from giving the tenant notice to quit the tenancy at the

10. 7 N.C. App. 687 (1970).

end of the month and evicting the tenant or doubling the rent the next month if the tenant can prove that the landlord's action is retaliatory? Most modern landlord-tenant statutes prohibit retaliatory evictions, and most include a presumption that any eviction with a specified period--six months, for example--after the tenant has sought to enforce the landlord's obligations is retaliatory. In addition, many courts in states that do not have specific statutes have held that retaliatory evictions are impermissible. In the leading case in this area, Edwards v. Habib,[11] a federal appeals court held that a retaliatory eviction of a tenant who complained about violations of the sanitary code was illegal. The court based its decision on public policy and statutory construction. It found that the condition and shortage of housing in the area, the expense of moving, the unequal bargaining power of landlords and tenants, and the social and economic importance of assuring at least minimum standards in housing made retaliatory evictions violate public policy. The court also found that the housing and building codes indicate strong and persuasive governmental concern about securing decent, safe, and sanitary housing for its citizens. Effective code enforcement depends in part on individual citizens' reporting violations, and permitting retaliatory evictions would frustrate the effectiveness as the housing code as a means of upgrading the quality of housing. For those reasons the court said that a presumption that intimidation is illegal can be inferred as inherent in the legislation. G.S. 160A-441 (authorizing cities and counties to exercise police powers to repair or demolish unfit dwellings) and G.S. 122A-2 (setting up the North Carolina Housing Finance Agency Act) both show a legislative concern for the condition of housing in North Carolina by declaring that there exists (1) a shortage of decent, safe, and sanitary low-income residential housing. and (2) occupied dwellings that are unfit for human habitation, both of which are inimical to the health, safety, and welfare of the people of the state. Those legislative findings, together with the specific statute providing that the landlord breaches his warranty to the tenant when he fails to comply with the housing and building codes or fails to keep the premises in a fit and habitable condition, can certainly be taken to prohibit retaliatory evictions if the reasoning in Edwards is followed by our court. In Evans v. Rose[12] the North Carolina Court of Appeals refused to recognize the tenant's defense of retaliatory eviction in an action for summary ejectment; but in that case the tenant pleading that she was evicted in retaliation for airing grievances of several tenants, based her argument on the grounds that eviction of a tenant for exercising her First Amendment rights was constitutionally impermissible. Edwards is based on entirely different basis, and our courts can follow its reasoning without overruling Evans. Another possible ground on which the court could base a decision that retaliatory evictions are unlawful is that they violate G.S. 75-1.1, the Unfair Trade Practices Act. Courts in other states have used this reasoning to prohibit such practices.

11. 397 F.2d 687 (D.C. Cir. 1968).
12. 12 N.C. App. 165 (1975).

DEFENDANT'S BOND TO STAY EXECUTION OF SUMMARY EJECTMENT JUDGMENT

In a very recent federal district court decision, Usher v. Waters Insurance and Realty Co., Judge McMillan declared unconstitutional (1) the provision of G.S. 42-43(b) requiring a tenant to post a bond of not less than three months' rent in order to stay execution and remain on the premises pending appeal to district court from a judgment for summary ejectment; (2) the portion of G.S. 42-32 that entitles a plaintiff to double the back rent due when the jury finds that the defendant's appeal from a summary ejectment action was without merit and taken for the purpose of delay; and (3) the part of Rule 62(a) of the Rules of Civil Procedure that excepts summary ejectment judgments from the general rule granting an automatic stay of execution for ten days after a judgment is entered.

Judge McMillan ordered that a tenant who appeals a summary ejectment judgment to district court may stay execution pending appeal by paying his rent as it becomes due, which is what new G.S. 42-44(c) provides. The clerk in Mecklenburg County has developed a bond form for such an appeal, requiring the tenant to pay into court his rent as it becomes due.

Although technically the judge enjoined only Mecklenburg County (the county where the action arose) officials from enforcing these statutes, magistrates and clerks throughout the state should follow the ruling. The Attorney General's Office has decided not to appeal it, and therefore this case will stand as the only adjudication of the constitutionality of these statutes.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1977
RATIFIED BILL
CHAPTER 770
HOUSE BILL 949

AN ACT TO DEFINE THE RESPONSIBILITY FOR MAINTENANCE OF RESIDENTIAL RENTAL UNITS.

The General Assembly of North Carolina enacts:

Section 1. Chapter 42 of the General Statutes is hereby amended by adding thereto a new Article 5, to read as follows:

"ARTICLE 5.
"Residential Rental Agreements.

"§ 42-38. Application.--This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State.

"§ 42-39. Exclusions.--The provisions of this Article shall not apply to transient occupancy in a hotel, motel, or similar lodging subject to regulation by the State Board of Health.

"§ 42-40. Definitions.--For the purpose of this Article, the following definitions shall apply:

(a) 'Action' includes recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession.

(b) 'Premises' means a dwelling unit and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants who are using the dwelling unit as their primary residence.

"§ 42-41. Mutuality of obligations.--The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent.

"§ 42-42. Landlord to provide fit premises.--(a) The landlord shall:

(1) comply with the current applicable building and housing codes, whether enacted before or after the effective date of this Article, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;

(2) make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition:

(3) keep all common areas of the premises in safe condition; and

(4) maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article.

"§ 42-43. Tenant to maintain dwelling unit.--(a) The tenant shall:

(1) keep that part of the premises which he occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises which he uses;

(2) dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner;

(3) keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(4) not deliberately or negligently destroy, deface, damage, or remove any part of the premises or knowingly permit any person to do so;

(5) comply with any and all obligations imposed upon the tenant by current applicable building and housing codes; and

(6) be responsible for all damage, defacement, or removal of any property inside a dwelling unit in his exclusive control unless said damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or his agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations.

"§ 42-44. General remedies and limitations.--(a) obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(b) No party shall be entitled to double damages in actions brought under this Article 5.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so. The tenant shall be entitled to remain in possession of the premises pending appeal by continuing to pay the contract rent as it becomes due; provided that, in such case, the provisions of G.S. 42-34(b) shall not apply.

(d) A violation of this Article shall not constitute negligence per se."

Sec. 2. Nothing in this article shall apply to any dwelling furnished without charge or rent.

Sec. 3. This act shall become effective on October 1, 1977, and applies to rental agreements entered into, extended, or renewed automatically or by the parties after October 1, 1977.