

845.00 SUMMARY EJECTMENT - VIOLATION OF A PROVISION IN THE LEASE.

NOTE WELL: Use this instruction where parties have entered into a lease specifically providing that the tenant do or not do certain things, and the lease also provides for automatic termination if the tenant violates one of those provisions of the lease. If the parties have not entered into such a lease and the alleged breach is the tenant's failure to pay rent, use N.C.P.I.-Civil 845.05.

This issue reads:

"Is the landlord entitled to possession of the leased premises?"

On this issue the burden of proof is on the landlord. This means that the landlord must prove, by the greater weight of the evidence, [five] [six] things:¹

First, that the tenant took possession of the premises under a lease with the landlord.² A lease is a contract for the exclusive possession of a premises. A lease may be written or verbal.³

Second, that the parties agreed as part of the lease that (*state provision(s) of lease that landlord contends has been violated, e.g., tenant would pay the rent by the 5th day of each month or would not keep any pets on the premises*).

Third, that the parties also agreed as part of the lease that it would terminate⁴ if (*state provision(s) of lease that landlord contends has been violated*).

Fourth, that (*state manner in which landlord contends tenant has violated the provision(s) that allow for termination of the lease.*).⁵

And [Fifth] [Sixth], that the landlord has demanded the tenant surrender possession of the premises.⁶

Finally, as to this issue on which the landlord has the burden of proof, if you find by the greater weight of the evidence that the landlord is entitled to possession of the leased premises, then it would be your duty to answer this issue "Yes" in favor of the landlord.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the tenant.

1 NOTE WELL: If the landlord is a public housing authority (PHA) and federal law permits but does not require automatic termination of the tenant's lease for the conduct the PHA contends occurred, the PHA bears the burden of establishing that it exercised discretion before pursuing eviction. See E. Carolina Reg'l Housing Auth. v. Lofton, __ N.C. __, __, 789 S.E.2d 449, 453 (2016) ("[W]hile a [PHA] may conduct no-fault evictions, it must exercise discretion in doing so."). See also Department of Housing & Urban Development v. Rucker, 535 U.S. 125, 133-34 (2002) ("[T]he [Public Housing Drug Elimination Act of 1988] does not require eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local [PHA] . . ."). When required, this instruction should reflect that the PHA must prove six elements and the following language should be inserted as the fifth element:

"Fifth, that the landlord exercised discretion before pursuing termination of the lease."

"Discretion 'involve[s] an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment.'" E. Carolina Reg'l Housing, __ N.C. at __, 789 S.E.2d at 454 (quoting Black's Law Dictionary (10th ed. 2014)). In the public housing context, the exercise of discretion requires consideration of a "wide range of factors," including "the welfare of the entire tenant population." Id. (citation omitted).

2 Summary ejectment is also available when the tenant entered into the lease with someone under whom the landlord claims privity. *McCombs v. Wallace*, 66 N.C. 481, 482 (1872). Modify this instruction accordingly if that situation occurs.

Plaintiff and defendant must have a landlord-tenant relationship. *McLaurin v. McIntyre*, 167 N.C. 350, 352, 83 S.E. 627, 628 (1914); *Hayes v. Turner*, 98 N.C. App. 451, 454, 391 S.E.2d 513, 515 (1990); *Jones v. Swain*, 89 N.C. App. 663, 668, 367 S.E.2d 136, 138-39 (1988).

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3 A lease that is for longer than three years from the date of making must be in writing.

4 *Morris v. Austraw*, 269 N.C. 218, 223, 152 S.E.2d 155, 158-59 (1967). If there is an issue as to the interpretation of a specific provision providing for termination or right of reentry, it may be appropriate for the trial judge to give a peremptory instruction. The meaning of nonambiguous clauses in a lease would be a matter of law for the court.

5 A tender of past due rent and costs does not affect the landlord's right to eject the tenant. *Charlotte Office Tower Assocs. v. Carolina SNS Corp.*, 89 N.C. App. 697, 366 S.E.2d 905 (1988).

NOTE WELL: If the tenant has offered evidence of an attempt to pay the landlord, you may wish to instruct the jury using the following language:

"Tenant's tender or offer to pay the rent due does not stop the landlord from pursuing this action."

However, if the landlord has accepted rent with full knowledge of the breach for which forfeiture might have been declared without asserting his right to eject the tenant, he may have waived the breach. Stanford v. Mountaineer Container Co., 88 N.C. App. 591, 594, 364 S.E.2d 153, 155 (1988); *Winder v. Martin*, 183 N.C. 410, 411, 111 S.E. 708, 709 (1922). If that is an issue in the case, give N.C.P.I.-Civil 845.15.

6 N.C. Gen. Stat. § 42-26(a).