

## 2012-2013 UPDATE COURSE

# SUMMARY EJECTION IN RESIDENTIAL TENANCIES

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**Learning Objective:** Upon completing this Section, licensees should have a better understanding of the legal and procedural aspects involved in evicting a residential tenant from a dwelling.

## INTRODUCTION

Since the 1970's, the North Carolina General Assembly has enacted a series of laws designed to protect *residential tenants*. These laws are found in various Articles of Chapter 42 of the General Statutes, one Article of which is the **Residential Rental Agreements Act** (hereinafter the "Act"). The Act has many purposes, primary of which is to require landlords to rent only "habitable" residential dwellings to tenants, which goal it accomplishes by setting forth detailed, statutory requirements. Additionally, it provides certain safeguards regarding the deposit and return of residential tenant security deposits and procedures for the removal of both tenants and the disposition of any personal property they may leave. **NOTE** the Act does **not apply** to commercial and industrial tenancies, nor does it apply to transient occupancy in a motel, hotel, or similar lodging nor any dwelling furnished rent free, such transient occupancy being governed by other laws. State laws governing vacation rentals are found in Chapter 42A of the General Statutes.

Any licensee who owns or attempts to manage residential rentals would be well advised to read and be familiar with the Residential Rental Agreements Act and the statutory obligations of landlord and tenant which, logically, are "mutually dependent." In other words, if a landlord breaches any of his/her statutory obligations to the tenant, then the tenant's continued

performance may be excused, and if the tenant fails to fulfill his/her obligations, s/he may be subject to eviction. Thus, brokers may be called upon, either as an owner of the property or in managing property for others, to initiate a legal proceeding to remove the tenant and his/her belongings from the property. The action is called *summary ejectment* and appears to baffle many licensees, given the number of calls Commission staff receives on this issue. For that reason, and because it is so commonly encountered by owners of residential rental property, it is the subject of this section. Understand that the *following discussion applies only to residential tenancies*. Why?

There are few analogous State laws regulating commercial landlord-tenant relationships, in part because commercial tenants are presumed to possess sufficient knowledge and business acumen to protect their own interests. While there are some statutes on point, when one wants to know *what are the respective rights and obligations of a commercial lessor and lessee*, the answer often is: *what does the lease agreement say*, since there are few state laws governing the relationship. A commercial lessor may have many more options available to it in the event of a tenant's default or breach, depending on the lease terms and absent applicable state law.

## SUMMARY EJECTMENT

### **Self-Help Prohibited in Residential Tenancies**

Hopefully *ALL licensees* are aware that an *owner of residential rental property* cannot just unilaterally change the locks on the property or otherwise interfere with the tenant's right to possess the premises without a court order. The public policy of North Carolina as to residential tenancies is clearly articulated in the General Statutes noted below.

**G.S. 42-25.6: Manner of ejectment of residential tenants.** "...a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit *only in accordance with the procedure prescribed* in Article 3 [summary ejectment] or Article 7 [expedited summary ejectment due to criminal activity] of this Chapter."

**G.S. 42-25.7: Distress and distraint not permitted.** "...distress and distraint are prohibited and ... landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with ..." other named statutes, which were discussed in last year's Update Course.

**G.S. 42-25.8: Contrary Lease Provisions.** "Any lease or contract provision contrary to this Article [2A] shall be void as against public policy."

Understand that *state laws pertaining to residential tenancies* do not just apply to brokers; rather, they *apply to ALL OWNERS of residential rental property located in North Carolina*, whether licensed or unlicensed, knowledgeable or ignorant. A broker may be subject to disciplinary action if s/he violates any landlord-tenant laws (or fair housing or other laws) in managing residential rental property owned either by others or by the broker. When brokers encounter unlicensed owners who are renting property they own, but who are violating some

provision of state landlord-tenant law, e.g., the tenant security deposit is in the owner's personal checking account, rather than in a trust or escrow account and there is no bond, the broker is encouraged to alert the owner to the fact that they are violating state law. At the very least, the broker could suggest that the owner go to the Real Estate Commission's website, [www.ncrec.gov](http://www.ncrec.gov), and click on Publications and then "Renting Residential Real Estate" and "Tenant Security Deposits" and either print or download these free publications. There is a third free publication, "Fair Housing," and all three of these brochures are available in Spanish.

### Who Can File the Complaint?

The law typically requires that the parties to a legal proceeding must have an "interest" in the subject matter of the proceeding and personal knowledge of the facts. In a lease situation, *the parties to the lease agreement are the lessor/landlord and the lessee/tenant*; thus they are the proper "parties" in a summary ejectment action commenced by or on behalf of the landlord as plaintiff to recover possession of his real property because of some breach by the tenant-defendant. *Can a broker initiate a summary ejectment action on behalf of the owner whose property the broker is managing?* It depends. State law requires that the complaint be in writing and signed by the party (owner) or his attorney, "...except the *complaint in an action for summary ejectment may be signed by an agent for the plaintiff.*" [G.S. 7A-216.] Further, "In any small claim action demanding summary ejectment or past due rent, or both, the *complaint may be signed by an agent* acting for the plaintiff ***who has actual knowledge of the facts alleged in the complaint.***" [G.S.7A-223.] Thus it's permissible under state law, so the question then becomes what authority has the owner given the broker in their written property management agreement and whether the broker has personal knowledge of the facts that must be proved.

For those who are REALTOR® members and may use the REALTOR® forms, the Exclusive Property Management Agreement, NCAR Std Form 401, states in pertinent part in Paragraph 5, "Authority and Responsibilities of Agent," the following:

During the time this Agreement is in effect, Agent shall: (k) institute and prosecute such proceedings in small claims court as may be necessary and advisable, in Agent's opinion, to recover rents and other sums due the Owner from tenants or to evict tenants and regain possession, including the authority, in Agent's discretion, to settle, compromise and release any and all such small claims proceedings;

Thus, NCAR's standard property management agreement authorizes the broker as the owner's agent to initiate legal proceedings on behalf of the owner. If a broker does not want this obligation or responsibility, then s/he should consider striking that clause from the agreement. Assuming, however, that the broker is willing to accept this responsibility, the remaining question is does the broker have personal knowledge of the facts underlying the legal action? Generally the answer is yes, if the broker is handling all aspects of managing the property. However, *if the tenant is paying the rent directly to the landlord and rent is not passing through the broker to the owner (which would require that the rents be deposited first in the broker's trust account), then the broker may not be able to file a summary ejectment action on behalf of the owner for non-payment of rent as the broker has no personal knowledge of when and how much the tenant has paid.*

**REMINDER:** Can't the tenant mail or bring a check payable to the owner to the broker's office and the broker writes "for deposit only" and deposits it directly into the owner's personal checking account? **NO.** The simple rule is, *if money belonging to others touches a broker's hand, it must first be deposited into the broker's trust account and clear before being disbursed to the consumer.* The only exceptions are non-cash earnest money deposits, tenant security deposits, and due diligence fees that may be held and safeguarded by a broker pending contract formation. The three banking day clock for the first two deposits, and the delivery obligation for the fee, begins to tick upon contract formation per Rule A.0107(a).

## **Eviction Procedure**

The statutes pertaining to summary ejectment are found at G.S. 42-26 through 42-36.2, some of which are reprinted at the end of this Section. The Administrative Office of the Courts (AOC), which oversees administratively the state's judiciary, has promulgated numerous forms for the public's use in various civil actions and special proceedings which forms may be found at [www.nccourts.org](http://www.nccourts.org) and click on Forms. The forms are fillable pdf files so one may enter the applicable information and print the completed document from the website. Brokers may find the following forms to be helpful, namely:

Complaint In Summary Ejectment, #AOC-CVM-201, last revised February 2012;  
Magistrate Summons, #AOC-CVM-100, last revised June 2011;  
Judgment in Action for Summary Ejectment, AOC-CVM-401, last revised February 2006;  
Complaint in Expedited Summary Ejectment Vacation Rental Agreement, #AOC-CVM-204,  
last revised February 2006;  
Magistrate Summons Complaint in Summary Ejectment Vacation Rental Agreement, #AOC-CVM-205, last revised June 2004;  
Judgment in Action for Expedited Summary Ejectment Vacation Rental Agreement, #AOC-CVM-206, last revised November 1999.

## **Venue, Filing and Service**

Summary ejectment proceedings typically are heard by *magistrates in the Small Claim Division of District Court for the county where the defendant is located.* (Usually the county where the property is located as well, since the defendant is still living there, but if the tenant already has vacated and the action is only for monies owed, then venue is the county where the defendant is living at the time of commencement of the action.) One initiates the action by paying the filing fee (believed to be \$96 as of July 2012) to file the complaint. The property owner is the named plaintiff and the tenant(s) is/are the named defendants. The person initiating the action should bring the following documents to the Clerk's office:

- 1) an original and *at least* 2 copies of the prepared complaint;
- 2) *at least* 3 copies of the Magistrate Summons with the names, addresses and county completed; and
- 3) a stamped envelope addressed to each defendant and a stamped envelope addressed to the plaintiff or plaintiff's agent.

Upon filing the complaint, the Clerk of Court will then complete the Summons and assign a trial date. A copy of the summons and filed complaint along with the envelopes addressed to each defendant and a check for the service fee should then be delivered to the Sheriff's office for service on the defendant(s). The fee is presently \$30 per defendant (in Wake County).

**NOTE:** Typically *personal checks are not accepted*. One may pay the filing and service fees in cash, by money order or certified check. The \$96.00 filing fee is paid to the \_\_\_\_\_ County Clerk of Court and a separate check/money order for the service fees should be payable to the \_\_\_\_\_ County Sheriff's Office. However, in some jurisdictions the Clerk collects both the filing fees and the service fees and then remits the appropriate portion to the Sheriff's Department.

State law provides that upon the filing of the complaint, the Clerk "... *shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint.*" Thus, if the complaint was filed and summons issued on Wednesday, June 20, the hearing date should be no later than Friday, June 29.

**How many copies are required?** One should have an *original of both the complaint and summons for the Court, one copy of each for the plaintiff, and at least one copy of each for each defendant*. Whoever signed the lease should be named as a defendant. If there is only one defendant, then an original and two copies of the summons and complaint should suffice, but if there are two lessees, as in the sample complaint at the end of this section, then one *minimally* would need an original and three copies of the summons and complaint, plus a stamped envelope for each named defendant even though they are at the same address. The filing fee would be \$96.00, but the service fee to the Sheriff would be \$60.00, \$30.00 for each named defendant. Actually, because the sheriff will both mail a copy and attempt personal service, it may be necessary to leave two copies of the summons and complaint for each defendant with the sheriff. Thus, the total may be original for the Court, one copy for the plaintiff, and four copies to the sheriff for service if there are two defendants.

### **Service**

By law, the sheriff is responsible for attempting to effect service on the defendants. It requires the officer to mail a copy of the summons and complaint to each defendant in the stamped envelope provided by the plaintiff "... no later than the end of the next business day or as soon as practicable at the defendant's last known address ...." In addition to mailing a copy of the summons and complaint to each defendant, the officer, within five days from summons issuance, may *either* attempt to call the defendants to arrange for service, or if unsuccessful, then the officer "... shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons, but at least two days prior to the day the defendant is required to appear ..., excluding legal holidays, at a time reasonably calculated to find the defendant at the place of abode ...." The officer shall either deliver a copy of the summons and complaint to the defendants personally at their dwelling or leave copies with a "...person of suitable age and discretion then residing therein...." If no one can be found at the dwelling, then the officer is to "affix copies to some conspicuous part of the premises claimed" and then return the original

summons to the Clerk noting the manner of service on the back of the summons. (See blank Summons reprinted at the end of this Section.)

### **Contents of Complaint**

The law allows a property owner to file for summary ejectment whenever a tenant or his assigns refuse to vacate the property after a demand to vacate and surrender possession of the property has been made if:

- 1) the agreed lease term has expired and the tenant holds over after the term; or
- 2) the tenant either "...has done or omitted any act by which ...his estate has ceased" according to the lease terms; or
- 3) a lessee of lands or tenements deserts the premises and leaves them unoccupied and uncultivated.

**NOTE: G.S. 42-3** states that where the oral or written lease provides a fixed date for the payment of rent, a forfeiture of the remaining lease term shall be implied if the lessee fails to pay the rent within ten days after the lessor or his agent has made a demand for all past-due rent. *Particularly where the lease is oral* and thus lacks a forfeiture clause, a broker should make an **express demand** on the tenant for past-due rent and *then wait ten days before filing the complaint*. For example, if rent is due on the first of the month and isn't paid, then anytime after the first the broker could provide either oral or written notice to the tenant demanding payment in full of all sums due by a stated date at least 10 days later and advise the tenant that the tenant's failure to pay will result in commencement of a summary ejectment action. If the demand is made on the tenant on the fourth day of the month, the lessor must wait until the fifteenth day to file the legal action. While the statute does not require the demand to be in writing, a written notice helps reduce proof problems.

*Must the landlord make a claim for delinquent rent and late fees or other charges at the time of filing the complaint in summary ejectment?* Not necessarily. G.S. 42-28 states:"... The plaintiff **may** claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed [\$5,000.00], but *if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery.*" Thus, one may request both a judgment for monies due as well as an order for possession in the same action, or may file two separate actions, the first being for possession, and once the tenant is removed, file a second action for monies due. However, *the standard complaint form in Paragraph 6 not only includes a claim for possession, but also a claim for monies owed as set forth in Paragraph 5;* the claim for monies owed may need to be severed at hearing if the defendant has not been personally served.

### **Complaint Paragraph 3**

*How does one complete paragraph 3 of the complaint?* The instructions on the back of the complaint form state in Item 5 as follows: (emphasis added.)

In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for *failure to pay rent when there is no **written** lease*, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before

filing the complaint.) If the landlord is seeking to remove the tenant for *failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked.* (The defendant breached the condition of the lease described below for which re-entry is specified.) And "failure to pay rent" should be placed in the space for description of the breach. If the landlord is *seeking to evict tenant for violating some other condition in the lease, the third block should also be checked.* If the landlord is claiming that the term of the lease has ended and the tenant refuses to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.

**What happens if the tenant pays all sums due prior to or at the hearing?** It depends. If the claim was forfeiture for failure to pay rent (first block in paragraph 3) and the defendant "... pays or tenders the rent due *and the costs of the action*, all further proceedings in such action shall cease." [G.S. 42-33.] In other words, the complaint should be dismissed because the tenant no longer is in default and has made the lessor whole. However, *where the lease is in writing*, it may provide that failure to timely pay rent is a breach of the lease and results in immediate forfeiture of possession. In this case the plaintiff would check the *third block in paragraph 3* of the complaint and state the reason in paragraph 4 (as in the sample complaint at the end of this Section), in which case the *lessor* may still be *entitled to regain possession* if he chooses to proceed with the action *even if the tenant pays all sums due.*

**BE AWARE** that the General Assembly passed legislation in early June 2012 amending certain portions of Chapter 42 (residential) landlord-tenant law, including a new subparagraph to G.S. 42-26 that will become effective October 1, 2012 and is reprinted at the end of this section. It basically provides that when a lessor seeks ejectment based on the tenant's having done or failed to do some act that, pursuant to the written lease terms, results in a termination of the tenant's estate, the lease may also include a clause acknowledging the lessor's right to accept partial rent or housing subsidies without waiving the lessor's right to proceed with the ejectment action.

### **Judgment and/or Writ of Possession**

The plaintiff or his agent must appear on the date and time scheduled for hearing and must prove entitlement to the relief requested by a *preponderance of the evidence*. If the defendant appears and admits the allegations, or fails to appear, but was *personally served* with the summons and complaint, then the magistrate may proceed to hear the plaintiff's evidence and enter a judgment either for possession of the property only or both possession of the property and monies due the lessor. If the defendant was *not personally served* with the summons and complaint *and fails to appear at the hearing*, the Court may issue a judgment directing that the defendant(s) be removed from the property, but cannot enter a judgment at that time for monies claimed to be due.

Either party may appeal the magistrate's decision to District Court by giving oral notice at the conclusion of the hearing or written notice within 10 days of the hearing. The order is not final until the 10 day notice of appeal period has run. To stay the writ of possession, a tenant who appeals the magistrate's decision must pay into Court not only all rent in arrears, but must

also sign an undertaking to timely pay rent that may become due to the Clerk of Court pending the hearing in District Court. See G.S. 42-34 regarding the undertaking on appeal and stay of execution.

Once the 10 day appeal period has expired and no appeal notice has been filed nor a stay of execution obtained, the *plaintiff must contact the Clerk of Court and request that the writ of possession be issued*. The sheriff must enforce the writ of possession within seven days after receiving it and must give the tenant written notice of the date the sheriff will effectuate the writ of possession and physically remove the tenant and the tenant's personal property from the residence, if the tenant does not voluntarily vacate prior to that date. No later than seven days after receiving the writ, the sheriff shall return to physically remove the tenant, if still in possession, and remove the tenant's personal property from the residence at that time as well unless the lessor signs a statement saying that the property may remain on the premises, in which case the sheriff simply will padlock the premises. What the sheriff or lessor may do with the tenant's personal property left behind was discussed in last year's Update Course and may be found on the Commission's website under "publications."

### **Judgment for Monies Owed**

As previously mentioned, if the defendant is not personally served and does not appear at the hearing, the magistrate cannot grant a judgment for monies owed, as there is no proof that the defendant has notice of the hearing and the opportunity to defend against the requested relief. Pre-printed Paragraph 6 of the complaint requests both possession and a judgment for monies due or to become due, yet the Court has no authority to enter a money judgment. To protect plaintiff's right to bring a subsequent action for monies owed, the plaintiff/broker/agent should orally move to amend the complaint and voluntarily withdraw the request for monies owed to preserve the right to file a separate action later and should proceed only with the request to regain possession of the property. Alternatively, the plaintiff might request that the claim for monies owed be continued for later hearing pending service on defendant and proceed with the request for possession.

### **Voluntary Surrender of Premises by Tenant**

Must a lessor file for summary ejectment where a tenant has *voluntarily* vacated the dwelling and ignored his or her obligations under the lease? Once again, it depends.

*Example:* Tim and Tina Tenant have fallen two months behind on the rent under an oral lease agreement. The landlord has sent them written notice to cure the default within 10 days or face eviction proceedings in court. Tim rents a truck, removes all of their furniture, and sends the landlord the keys with a note telling the landlord that Tim and Tina are relinquishing the premises to the landlord because they have no money, but hope someday to repay the landlord.

The foregoing constitutes a voluntary surrender by the tenant. The summary ejectment action is unnecessary because the tenant no longer is in possession of the property and has clearly indicated his intent in writing to surrender possession to the landlord and has returned the keys. However, when the tenant hasn't been seen in awhile, but fails to give unequivocal notice of his/her voluntary relinquishment of the premises, what should a lessor do? To be absolutely safe

(and legal), the landlord should file for summary ejectment and obtain a writ of possession. Alternatively, the landlord might follow the procedure set forth in **G.S. 42-25.9(e)** regarding abandoned personal property, which provides:

... personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. *A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.*

[Emphasis added.]

Note that there must be “*evidence that clearly shows*” that the tenant has ceased occupying the premises in order to be able to utilize this procedure. Thus, where the tenant hasn’t been seen, but all of their property is still in the premises, there would not appear to be any evidence that the tenant has voluntarily vacated. If a landlord wanted to be restored to possession in such a case, s/he should file for summary ejectment and obtain the necessary court order to regain possession and avoid potential liability.

## **ACT PROHIBITING RETALIATORY EVICTION**

Lastly, G.S. §42-37 prohibits “**retaliatory eviction,**” the eviction of a tenant by a landlord in response to the assertion by the tenant of a legal right. The retaliatory eviction statute is designed to protect a tenant who in good faith does any number of protected activities.

### **Protected Activities of Tenants**

- Complains to a government agency
- Requests repairs by the landlord
- Exercises legal rights under the lease
- Exercises rights under federal or state law
- Becomes involved in a tenants' rights organization

In addition, a tenant is protected from retaliatory action by a landlord where a government agency issues a formal complaint to a landlord concerning the rented premises. *If a landlord tries to evict a tenant within 12 months after the occurrence of a protected tenant activity, the tenant can raise the defense of retaliatory eviction. If the tenant prevails, the landlord will be prevented from evicting the tenant.* What if six months after the tenant has filed a complaint with a government agency, the tenant fails to timely pay the rent? Is the landlord still precluded from evicting the tenant? No, because now, absent a court order, the tenant is in breach of his/her lease obligations and the landlord may file summary ejectment to regain possession of the unit.

## **Selected Statutes - Summary Ejectment**

### **§ 42-26. Tenant holding over may be dispossessed in certain cases.**

(a) Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such 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 made 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 the 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.

(b) An arrearage in costs owed by a tenant for water or sewer services pursuant to G.S. 62-110(g) or electric service pursuant to G.S. 62-110(h) shall not be used as a basis for termination of a lease under this Chapter. Any payment to the landlord shall be applied first to the rent owed and then to charges for electric service or water or sewer service, unless otherwise designated by the tenant.

(c) In an action for ejectment based upon G.S. 42-26(a)(2), the lease may provide that the landlord's acceptance of partial rent or partial housing subsidy payment does not waive the tenant's breach for which the right of reentry was reserved, and the landlord's exercise of such a provision does not constitute a violation of Chapter 75 of the General Statutes. [**Editor's note:** (c) becomes effective October 1, 2012.]

### **§ 42-28. Summons issued by clerk.**

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent 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.

### **§ 42-29. Service of summons.**

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of

the defendant within five days of the issuance of the summons, but at least two days prior to the day the defendant is required to appear to answer the complaint, excluding legal holidays, at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section.

**§ 42-30. Judgment by confession, where plaintiff has proved case, or failure to appear.**

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if (I) the plaintiff proves his case by a preponderance of the evidence, (ii) the defendant admits the allegations of the complaint, or (iii) the defendant fails to appear on the day of court, and the plaintiff requests in open court a judgment for possession based solely on the filed pleadings where the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed and the defendant has not filed a responsive pleading, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding the jurisdictional amount established by G.S. 7A-210(1), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and if supported by a preponderance of the evidence, give judgment as he may find the fact to be.

**§ 42-31. Trial by magistrate.**

If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be.

**§ 42-33. Rent and costs tendered by tenant.**

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 in such action 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 of such payment, or to the time of a 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.

**§ 42-36.1A. Judgments for possession more than 30 days old.**

Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment.

**§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.**

(a) When Sheriff May Remove Property. – Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

- (1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or
- (2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property. – When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Except for the disposition of manufactured homes and their contents as provided in G.S. 42-25.9(g) and G.S. 44A-2(e2), within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff. – A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. – The notice required by subsection (a) shall, except in actions involving the lease of a space for a manufactured home as defined in G.S. 143-143.9(6), inform the tenant that failure

to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

- (1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;
- (2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or
- (3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ.