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Who Is a Tenant - The Correct Definition of the Status in North Carolina

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WHO IS A TENANT? THE CORRECT DEFINITION OF THE STATUS IN NORTH CAROLINA

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Tenants in North Carolina no longer derive all their rights against landlords from the terms of their leases. Statutes now confer on tenants rights that could once have been won only by those lucky enough to enjoy an unusual degree of bargaining power. The Residential Rental Agreements Act of 1977 reverses the common law rule that landlords have no duty, in the absence of express covenants, to provide residential tenants with suitable premises.[1] This Act implies in all leases which fall within its coverage a non-waivable requirement that landlords deliver and maintain "fit and habitable" premises.[2] The Landlord Eviction Remedies Act of 1981 limits landlords to the use of judicial means for eviction of residential tenants.[3] In doing so this Act denies a common law privilege of landlords to use reasonable force in

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1. "There is no implied covenant or warranty that at the time the term commences the premises are in a tenantable condition or that they are adapted to the purpose for which leased. The tenant, then, cannot use such unfitness either as a defense to an action for rent or as a basis for recovery in tort for damages to person or property. The reason assigned for this rule is that the tenant is a purchaser of an estate in land, subject to the doctrine of *caveat emptor*. He may inspect the premises and determine for himself their suitability or he may secure an express warranty." 1 AMERICAN LAW OF PROPERTY 267 (A. James Casner ed., 1952).

2. N.C. GEN. STAT. § 42-42 (1993) states:

(a) The landlord shall . . .

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

(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. . . .

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

3. N.C. GEN STAT. § 42-25.6 (1993) states:

It is the public policy of the State of North Carolina, in order to maintain the public peace, that 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 of this Chapter [Summary Ejectment].

Tenants may not waive the provisions of the Landlord Eviction Remedies Act. "Any lease or contract provision contrary to this Article shall be void as against public policy." *Id.* at 42-25.8.

evicting tenants after the termination of leases.[4] Should a landlord use self-help, tenants are entitled to be put back in possession of the property from which they were evicted.[5] Likewise, the Retaliatory Eviction Act of 1979 prohibits eviction of residential tenants in retaliation for certain lawful acts relating to the condition of the premises, requesting repairs or complaining about violations of a housing code.[6] This Act forecloses a common law right to terminate periodic tenancies "for any legal reason or no reason at all."[7] The Tenant Security Deposit Act of 1977 gives all residential tenants the right to have their security deposits kept separate from the landlords' other assets, thus

4. "At common law, one with the right to possession could bring an action for ejectment, a 'relatively slow, fairly complex, and substantially expensive procedure.' But . . . the common law also permitted the landlord to 'enter and expel the tenant by force, without being liable to an action of tort for damages, either for his entry upon the premises, or for an assault in expelling the tenant, provided he uses no more force than is necessary, and do[es] no wanton damage.' 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.' " Lindsey v. Normet, 405 U.S. 56, 71 (1972).

5. "If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. . . ." N.C. GEN. STAT. § 42-25.9(a) (1993).

6. N.C. GEN. STAT. § 42-37.1 (1993) states:

> (a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:
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> (1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42; [Residential Rental Agreements Act]
>
> (2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes. . . .
>
> (b) In an action for summary ejectment . . . a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

"If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment." *Id.* at § 42-37.2(a). Waiver of rights created by the Act is void. *Id.* at § 42-37.3.

7. "Until recently, the common law made no inquiry into the purpose or motives prompting a landlord to take what otherwise appeared to be legitimate actions concerning his relationship with a tenant. For example, his reasons for giving notice to terminate a periodic tenancy, for increasing rent or otherwise altering the terms of continued occupancy after expiration of the original tenancy, or refusing to renew a tenancy were considered irrelevant. A landlord could take these actions for any legal reason or no reason at all. When the landlord utilized the summary eviction proceeding to regain possession, the court's factual inquiry was quite limited. The only issue to be resolved was whether one of the statutory bases for the action had been proved, most commonly, nonpayment of rent, breach of lease covenants, or proper termination of the tenancy." ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 717-18 (1980).

granting tenants a right once available only in the unlikely event it could be secured as a result of arms-length bargaining.[8]

As a result of legislation, many of the essential terms in residential leases are now imposed by law. As a practical matter residential leases today contain no terms, aside from the dates of occupancy and the amount of the rent, that derive their force solely from the agreement of the parties.[9] The rights of residential tenants are governed by status, not contract. Where there are rights, those rights arise because of membership in the protected class of a statute.[10] The contractual element has diminished to the point that just about the only choice left to a would-be tenant is whether to sign the lease.

A consequence of this shift from contract to status is a hitherto unknown emphasis on the definition of "tenant."[11] When the source of rights was solely the rental agreement, the classification of the parties was irrelevant. Now that so much depends on whether the party fits within a certain category, it has become crucial to know who qualifies for membership. Unfortunately, the statutes themselves are of noticeably little help. The word "tenant" which is so critical to the determi-

8. N.C. GEN. STAT. § 42-50 (1993) states:

> Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina . . . . The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located. . . .

The Act applies to "all person, firms, or corporations engaged in the business of renting or managing residential dwelling units, excluding single rooms, on a weekly, monthly or annual basis." *Id.* at § 42-56.

9. It may be readily admitted that little real bargaining precedes the typical residential rental "agreement." The point is that prior to the legislation the effectiveness of the terms stemmed from the formal fact of agreement, not from statute.

10. The irony of the movement from contract to status is not lost to those knowledgeable in legal history. In a famous dictum Sir Henry Maine declared: "the movement of the progressive societies has hitherto been a movement *from Status to Contract.*" ANCIENT LAW 100 (1861) (emphasis in original).

> England, the home of the common law, has also witnessed the creation of status-based rights: In the twentieth century, parliament has taken to imposing unexcludable 'implied terms' in order to confer minimum standards upon person entering into certain classes of contract. Of course, such terms are fictitious. The object is to protect classes of persons who are thought incapable for economic reasons of protecting themselves when making contracts. Protection was extended first to leasehold tenants, then to employees, and now to consumers. The result is that the law of contract is diminishing in importance as regards the ordinary non-commercial man; all the important transactions he is likely to make are governed not by the common law of contract but by the statutory law of landlord and tenant, labour law, or consumer law.

J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 296 (2d ed. 1979).

11. Scattered cases have distinguished "tenant" from other categories: employee, Simons v. Lebrun, 219 N.C. 42, 12 S.E.2d 644 (1941), purchaser, Anderson v. Anderson, 101 N.C. App. 682, 400 S.E.2d 764 (1991), even vendor, Bason v. Smith, 230 N.C. 537, 53 S.E.2d 541 (1949); and a line of cases has concerned the distinction between "tenant" and sharecropper, Harrison v. Ricks, 71 N.C. 7 (1874), State v. Pender, 83 N.C. 651 (1880), Rouse v. Wooten, 104 N.C. 239, 10 S.E.190 (1889), State v. Austin, 123 N.C. 749, 31 S.E. 731 (1898).

nation of status is not defined in any of the statutes.[12] One legislative clue is provided by the Residential Rental Agreements Act, which expressly excludes from its coverage "transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Health Services."[13] Short-term paying "guests" in public accommodations are, in other words, not tenants within the meaning of the statute. Beyond that, there is only a definition of the word "premises," as used in the Act, to mean "a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is 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."[14]

A recent case in the North Carolina Court of Appeals, *Baker v Rushing*,[15] called forth the first judicial definition of the word "tenant." The plaintiffs in *Baker*, residents in a building styled by defendant-owners a "hotel," claimed to be "tenants" within the scope of both the Residential Rental Agreements Act and the Landlord Eviction Remedies Act.[16] Appealing from a grant of summary judgment for defendants, plaintiffs were entitled to have the evidence viewed in the light most favorable to them. As summarized in the appellate court's opinion, the evidence showed that "none of the plaintiffs had other residences"[17] and that "each plaintiff leased his apartment as his sole and permanent residence."[18] Additionally, "some plaintiffs had resided in the building for as long as six years."[19] The court of appeals concluded that the evidence could support a finding that plaintiffs were "residential tenants who leased the apartments as their primary

12. The reciprocal term, "landlord," is defined in the Residential Rental Agreements Act, but unhelpfully: " 'Landlord' means any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article." N.C. GEN. STAT. § 42-40(3) (1993).

13. N.C. GEN STAT. § 42-39(a) (1993). Also excluded are all "dwelling[s] furnished without charge or rent." *Id.* at § 39(b). All the statutes apply to "residential" tenants and refer to the premises as "dwelling units." The Tenant Security Deposit Act excludes "single rooms." *Id.* at § 42-56.

14. N.C. GEN. STAT. § 42-40(2) (1993).

15. 104 N.C. App. 240, 409 S.E.2d 108 (1991).

16. The background of the case, as reported in a legal newspaper, was that developers had bought a run-down hotel, planning to renovate and convert it into an office building, and had required the occupants to leave. N.C. LAW. WEEKLY, Oct. 21, 1991. Although the building seems to have been nominally a hotel since at least 1980, a hotel license was obtained only in January, 1988, after the acquisition of ownership by the defendants. 108 N.C. App. 243-44, 409 S.E.2d 110 (1991).

17. *Id.* at 243, 409 S.E.2d at 110.

18. *Id.* at 247, 409 S.E.2d at 112.

19. *Id.* The only other items of evidence bearing on the plaintiffs' status as residential tenants were that the apartments contained "either one or two bedrooms, a kitchen/living room and a separate bath" and that the weekly payments for the apartments were "referred to by each party as 'rent.' " *Id.*

residences."[20] In so doing, the court reversed the order of summary judgment and remanded the case for a new trial.

The result in the *Baker* case is clearly correct. Plaintiffs were not transient occupants, regardless of the label defendants attached to their building.[21] Yet the court's emphasis on the plaintiffs' residence as "sole," "permanent," and "primary" risks adding a restrictive element to the definition of "tenant."[22] A person may be a tenant even if the particular dwelling unit is not that person's sole, permanent, or even primary residence. For example, a parent who rents an apartment near a hospital where a child is a patient is clearly a tenant, despite the fact that the parent's principal residence remains elsewhere. All that should be required is that the facts exclude the possibility of "transient occupancy in a hotel, motel, or similar lodging."[23]

The court's emphasis on the plaintiffs' making the apartments their "primary residences" came from its reading of the statutory definition of "premises." As elided by the court, the word is defined by the Residential Rental Agreements Act to mean "a dwelling unit . . . normally

20. *Id.* One commentator recognized that "[t]he court placed great weight on the fact that plaintiffs leased the premises as primary residences along with other factors tending to indicate the existence of a landlord-tenant relationship." Amy M. Campbell, Note, *When A Hotel Is Your Home, Is There Protection?* 15 CAMPBELL L. REV. 295 (1993).

21. The Residential Rental Agreements Act excludes only "transient occupancy" in hotels, not all occupancy. N.C. GEN. STAT. § 42-39(a). Long-term residence in a hotel would seem to be within the coverage of the Act. *Cf.* Holstein v. Phillips, 146 N.C. 366, 370, 59 S.E.2d 1037, 1039 (1907) ("even at a public inn or hotel, one who holds the position as a regular boarder or lodger" is not a guest).

22. As summarized in a legal newspaper, the first question to be asked in determining whether persons are tenants is: "Do the occupants have an outside residence other than the hotel?" N.C. LAW. WEEKLY, Oct. 21, 1992.

Four other questions are distilled from the case: (1) Are the rooms furnished like apartments, with kitchens, bedrooms, and the like? (2) How long have the occupants lived in the rooms? (3) Are payments for the rooms made at regular intervals, such as weekly or monthly? (4) Are the payments referred to as "rent"? *Id.*

The last question cannot be given much weight since the court declared that whether plaintiffs were residential tenants must be determined by looking at all the circumstances: "the fact that a building is identified as a 'hotel' and those who reside in it as 'guests' is not determinative." 104 N.C. App. 240, 247, 409 S.E.2d 108, 112. If calling a building a hotel does not make it one, then calling payments "rent" does not make them such. The only relevance of payments, whatever their label and interval, is to rebut the exclusion of "dwellings[s] furnished without charge or rent." N.C. GEN. STAT. § 42-39(b) (1993). *Cf.* Harrison v. Ricks, 71 N.C. 7, 11 (1874). ("The use of the word 'rent,' as that the owner has 'rented' his land to another, has by itself, but little weight in the interpretation of an oral or inartificially and obscurely written contract.").

The truly determinative question is whether the occupancy is "residential," since "transient occupancy" must be excluded. In this inquiry, furnishings and facilities are relevant, although it is the exceptional hotel today that does not provide a "separate bath" and although an increasing number of hotel units are suites with separate bedrooms and often some kitchen facilities. Length of stay is evidence of intention but is not itself conclusive. A residential tenant is covered from the commencement of the tenancy; if, for example, a landlord violated one of the statutes early in the tenancy, it would be irrelevant that the tenant's actual stay had been brief.

23. N.C. GEN STAT. at § 42-39(a) (1993). In addition, the lease may not be gratuitous. *Id.* at 39(b).

held out for the use of residential tenants who are using the dwelling [unit] as their primary residence."[24] As noted above, the Act defines premises in full to mean "a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is 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."[25] In context, the reference to "primary residence" qualifies not the dwelling unit but the appurtenant facilities. The expansive definition of "premises" is understandable because the central duty of landlords under the Residential Rental Agreements Act is to do "whatever is necessary to put and keep the premises in a fit and habitable condition."[26] To this end, the word "premises" is defined to include not only the dwelling unit itself but also specific areas, both indoor and outside: "the structure of which it is part and facilities and appurtenances therein," as well as "grounds, areas, and facilities normally held out for the use of residential tenants who are using the dwelling unit as their primary residence." As applied to the *Baker* case, if the so-called hotel had a laundry room or an outdoor seating area, these would be included within the "premises" for the purposes of the Act.

The correct definition of "tenant" is crucial to the modern law of landlord and tenant, in which so many rights are based on status. The public policy of aiding tenants, for so long disadvantaged by the market and by common law rules favoring landlords, supports an expansive definition. The statutes, while silent on the particular subject, also support a broad definition of "tenant," as shown, for example by the inclusive definition of "premises." Tenants of dwelling units should include all those not transients and not donees, regardless of whether they have another residence.

24. 104 N.C. App. 246 (quoting N.C. GEN. STAT. § 42-40(2) (1993)).
25. N.C. GEN. STAT. § 42-40(2) (1993).
26. N.C. GEN. STAT. § 42-42(a)(2) (1993).