

# Self-help remedies aren't the best course for commercial landlords

Anyone who leases a property on a regular basis sooner or later runs into the same problem — a tenant who stops paying rent or otherwise stops honoring the tenant's obligations under the lease. The landlord asks the tenant to vacate the space, and the tenant continues to stay while not paying rent. The landlord, in an effort to avoid contacting an attorney, wants to know the answer to a simple question: Can I lock the tenant out and avoid filing an eviction action? The short answer is “yes” under certain limited circumstances. Even so, the landlord probably doesn't want to, for several reasons.

Before a landlord can take such self-help actions, there are certain conditions required, including the following:

- The lease must contain a provision that permits the landlord to use this remedy. In other words, is there a provision in the lease that gives you the right to forego judicial process and permits you to use your own abilities to remove the tenant from the space? If your lease does not have such a provision, then you do not have that option. Your only option is to file an eviction action — known as a “summary ejectment” action.

- The tenancy must be entirely commercial in nature. Landlords cannot use self-help remedies against residen-

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tial tenants. A landlord using a self-help remedy against a residential tenant subjects the landlord to liability under state law for violations of fair housing law, unfair and deceptive trade practices, and related claims. Even locking out a “mixed” tenant (such as a studio rented to

an artist whereby the artist both lives in the studio and operates his business out of the studio) exposes the landlord to liability under such laws. There must be no question that the tenant's operation in the space is entirely commercial in nature.

- Self-help must be peaceable, with no violence or force, even if the first two conditions are met. A landlord cannot use force to retake a premises through self-help. If the tenant in any way resists the landlord's efforts, the landlord must back down from the self-help remedy and must use judicial process to remove the tenant.

The practical effect of the limitation to “peaceful” self-help solutions can be manifested in a variety of ways. For example, suppose the landlord wishes to go by the tenant's premises and change the locks. Assuming the tenant is not present when the landlord arrives, the landlord can change the locks in a peaceful fashion — provided the landlord does not use force to change them. So even if the tenant is not present, if the landlord has to use force to change the locks (in other words, break into the building to get to the locks), then the landlord is in violation of the limitations on self-help evictions.

Or suppose when the landlord arrives to change the locks, the tenant is present and operating his or her business? The landlord cannot confront the tenant in any fashion in trying to change the locks. Furthermore, if the tenant tells the landlord to leave, then the landlord must leave. It would not be advisable for the landlord to return later after being instructed to leave in the first instance. The tenant could seek to assert a civil or criminal trespass against the landlord, since the landlord was told earlier to leave the property. Also, the return runs the risk of a confrontation between a landlord trying to take possession of his or her premises and a tenant seeking to preserve the tenant's business from the landlord's “interference.” Such confrontations are not uncommon, and the author is personally familiar with assault charges that were lodged between a landlord's agents and a tenant

when a landlord attempted a self-help remedy over the tenant's objections.

There are other potential problems even if it appears the tenant will not offer any resistance. A landlord does not have an automatic right to take possession of a tenant's belongings at the time when he or she exercises the self-help remedy. Any lien the landlord has against such belongings arises under state law only after the tenant has abandoned the premises for at least 21 days. A landlord cannot hold the tenant's property "hostage" during this period in an effort to leverage past-due rent or other concessions. If the tenant requires either access to the property or a return of the property during the 21 days after the tenant has been removed, the landlord must provide either access or the property — or run the risk that the tenant claims the landlord has illegally converted the tenant's personal property.<sup>1</sup>

It is for all those reasons that the author has continually advised commercial landlords to use the summary-ejectment process to retake possession of a premises occupied by a defaulting tenant. The summary ejectment process in North Carolina usually involves the landlord filing a formal eviction complaint (available at all clerk of court's offices as well as online) and paying a nominal filing and service fee of less than \$100 to sue the tenant for possession of the premises. A party filing the complaint does not have to be an attorney. The summary-ejectment process is designed to take place quickly, and normally the hearing on the landlord's complaint will take place within 10 business days of its filing. As long as the complaint seeks possession of the premises and not any money damages, the sheriff can serve the tenant with the complaint by simply posting it on the door of the premises — personal service is not required.

The vast majority of such complaints are uncontested. The landlord presenting a simple case consisting of the lease, a notice to the tenant of default under the lease with a request to cure the default and a demonstration that the tenant has not cured the default within the applicable time period set by the lease will be granted an order of possession by the magistrate. If the tenant does not appeal to the district court within 10 days, the order becomes final, allowing the landlord to obtain a writ of execution from the clerk for the local sheriff to enforce the order.

There are a few quirky issues, the most significant being a landlord's claim for money damages arising from the tenant's default. The jurisdictional limit of small claims court, where the ejectment action is filed, is \$5,000. A magistrate cannot award more than that in money damages in addition to granting possession of the premises. A landlord having a claim for money damages in excess of \$5,000 must claim no money damages in the ejectment complaint. The landlord can seek actual money damages from the tenant arising from the default in a separate later action. If the landlord seeks any money damages from the tenant in the ejectment action along with seeking possession of the premises, then the law holds that the landlord's claim is limited to what was sought in the ejectment complaint. The landlord cannot claim additional monetary damages later.



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The summary ejectment process is designed to be user friendly, quick and — in most instances — final. A judgment for possession puts on record the landlord's right to possession of the premises. It also provides the landlord with civil process in the form of the local sheriff's department, a remedy to regain possession of the premises and a way avoid all the issues that can arise from a landlord using a self-help remedy.

<sup>1</sup>The claim that the landlord has converted the personal property can be made by more than the tenant. For example, any lender or vendor that has a properly recorded UCC-1 financing statement giving the third-party rights to the tenant's inventory, materials, etc., could claim that the landlord is depriving that third party from having lawful access to the items remaining in the leased premises.