

A NEWSLETTER OF CURRENT BUSINESS AND LEGAL MATTERS



Accepting Partial Rent

By Joseph A. "Joe" Davies



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In most cases, a little knowledge can be a dangerous thing. Perhaps nowhere is this more true than when it comes to a partial knowledge of the law. Specifically, in this case, partial knowledge of a change in the landlord-tenant statutes from a few years ago. We wrote about it at the time, but we continue to get questions that indicate that while many landlords know that the law changed, in a good way for them, they are not fully aware of how to take advantage of it, which could lead to an unpleasant surprise.

The Way it Was

Until the law was changed in 2012, if a landlord accepted any payment of rent from a tenant, that served to waive the landlord's right to evict for a previous breach of the lease. That meant that a tenant could theoretically pay as little as \$1 in past due rent, and, if the landlord accepted that rent, he or she would be prohibited from evicting the tenant for failure to pay the remaining amount of the rent (at least until the tenant missed another rental payment). Therefore, it was always our advice that if you wanted to evict your tenant, you needed to refuse to accept any rental payment.

The Way it Is and the Confusion

Now, the statute specifically includes a provision stating that "the lease may provide that the landlord's

acceptance of partial rent ... does not waive the tenant's breach." In simpler terms, this means that a landlord can now accept a partial payment of rent, and still evict the tenant for failing to pay rent in full. Unfortunately, many landlords call our office and, while they understand that the law has changed, they have overlooked the language that requires the lease to provide for the acceptance of partial rent. If you are using an older form lease, or created your own lease prior to the change in the law, or if your lease with a particular tenant pre-dates the change in the law, chances are very high that your lease does not include this provision. If that provision is missing, that means the old rule prevails, and any acceptance of partial rent effectively restarts the clock on pursuing an eviction.

Therefore, unless you are certain that your lease contains such a provision, the safer course will continue to be to refuse to accept any rent following a breach of the lease, if the goal is to pursue an eviction. And, if your lease does not contain this provision, that probably means that you are due for an update to your lease agreement.

If you have questions about updating your lease agreement or accepting partial rent, please feel free to contact us.



Clarifying Possessory Liens in North Carolina

By James R. Vann

Retaining Possession of Personal Property for Nonpayment of Labor and Materials

Suppose you have invested labor and parts in a piece of construction equipment and you have not been paid. The person with whom you contracted for the repair of this equipment is not the title owner; rather, the person who took the equipment to you and asked you to repair it leased the equipment from the owner in order to perform work. (We will refer to this person as the “lessee.”) The job shouldn’t last more than a month, and this lessee is from out of state. Now, you think, you have two problems: (1) you are not dealing with the legal owner of the property; and (2) you realize that once you release the property to the lessee and the lessee still has not paid your bill, you will never see your money again. What should you do? Is it possible that you can keep the equipment or sell it, even if the title owner was not the person who asked you to repair it?

Unfortunately, this dilemma is not unlikely. Many people will lease heavy construction equipment for relatively short jobs, and under the terms of a typical lease contract, the lessee is obligated to keep the equipment in good working condition and must keep the equipment maintained. Halfway through the job, the equipment becomes clogged with ash or debris and requires routine maintenance and service. The lessee needs this equipment back in a hurry. And here is where you come in.

Possessory Liens on Personal Property in North Carolina

North Carolina law provides a means whereby a person who improves, stores, or invests labor or materials in personal property may be entitled to keep the property for a certain length of time, and even sell the property if the bill remains unpaid. These statutes codify the common law principle that a mechanic has a possessory interest in a vehicle left in his care by the owner or legal possessor and in which the mechanic has invested labor and materials. This possessory interest manifests a balancing of the competing interests between ownership rights and the right of a mechanic to have available security for the service rendered. North Carolina’s lien law regarding personal property depends in part upon the nature of the property at issue and the person with whom you are dealing.

Statutory Definition of Owner

Knowing who exactly is an “owner” under the statute is helpful in determining your legal rights. N.C. Gen. Stat. §44A-1 defines an “owner” as

- (1) any person having legal title to the property; or
- (2) a lessee of the person having legal title; or
- (3) a debtor entrusted with possession of the property by a secured party;
- (4) a secured party entitled to possession; or
- (5) any person entrusted with possession of the property by his employer or principle who is an owner under any of the above.

If you are dealing with the actual owner, a person who leased the property from the actual owner, or any agent or employee of the actual owner or lessee, then your lien is only limited to the lesser of the contract price or the reasonable charges for all of your services. These are generally the people you will deal with on a daily basis. However, one relatively common situation where you will not be dealing with an owner is the situation where you perform services on property pursuant to a subcontract. Therefore, if (1) the property at issue is not a motor vehicle, your lien will be limited to \$100 and the property is easily recovered by depositing this amount with the Clerk.

Statutory Definition of Motor Vehicle

Chapter 44A of the North Carolina General Statutes incorporates the definition of “motor vehicle” as set forth in Chapter 20, relating to the Division of Motor Vehicles. “Motor vehicle” is defined as “[e]very vehicle

which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle” (emphasis added). For illustrative purposes, although trailers and mobile homes are obviously not self-propelled, they still meet the definition of being a motor vehicle because they were designed to run on the highway when pulled by another vehicle. A recent North Carolina case emphasized the word “designed” as found in the statute: the Court held that even a mobile home that has been attached to the land is still considered to be a motor vehicle since it was originally designed to run upon the highway.

Most construction equipment is self-propelled and therefore should fit the definition as being a motor vehicle. This definition is not limited to vehicles required to be registered with the Department of Motor Vehicles.

General Procedure for Possessory Liens Against Motor Vehicles

Generally, any person who repairs, services, tows, or stores motor vehicles in the ordinary course of business has a statutory, possessory lien upon that motor vehicle for reasonable charges for such work. In other words, your lien is not limited other than by the amount that is reasonable for the work performed, whether you are dealing with an owner or a legal possessor. This provision also allows you a lien for the full amount of your services if you have performed the work pursuant to a subcontract.

If your bill has not been paid for 30 days, you may enforce the lien by public or private sale. For towing and storage charges only, you only need to wait 10 days. Additional provisions that deal specifically with storage charges are set forth in the statute.

Motor Vehicles Required to Be Registered

You must send notice to DMV that a lien is asserted and a sale is proposed if the property is a motor vehicle that is required to be registered. DMV in turn will send out a notice to the person having legal title to the property, as well as others claiming an interest in the property, within 15 days of your notice of intent to enforce the lien. This notice sets forth specific information as required by statute and informs the recipient that the recipient has a right to a judicial hearing at which time the validity of the lien will be determined before a sale takes place. If the recipient fails to notify DMV by certified or registered mail, return receipt requested, within 10 days of receipt that hearing is desired, the recipient has waived the right to a judicial determination. DMV will notify you in this event, and you may proceed to enforce the lien by public or private sale.

If DMV notifies you that its notice to the recipient has been returned as undeliverable, or if it cannot ascertain the name of the person having legal title to the vehicle and the property is worth less than \$800, you may institute a special proceeding for authorization to sell the vehicle. Special proceedings are heard before the Clerk of Superior Court in the county where the vehicle is located.

Motor Vehicles Not Required to Be Registered

In the event the property upon which your lien is claimed is not a motor vehicle required to be registered, you must send a notice to the person having legal title and to the person with whom you dealt if different from the person having legal title. This notice must set forth very specific information as required by statute and failure to comply with the statute may subject you to a one hundred dollar penalty, actual damages, and attorney’s fees. Additionally, the sale of the vehicle will most likely be set aside.

If the recipient fails to notify you within 10 days that a hearing is desired, that right will be waived and a public or private sale may proceed.

Termination of Lien

The possessory lien on personal property terminates when the property is voluntarily relinquished. If the owner or other legal possessor writes you a bad check or otherwise removes the lien property without your permission, you may recover the property from that person by judicial process. If, however, you voluntarily return the property you will lose your right to claim or enforce a lien on the property.

Notice of Sale

The statute requires that certain detailed procedures be followed before a public or private sale of the property takes place. The statute provides that certain items be included in the Notice of Sale, that the sale be advertised if the property is worth more than a specified dollar amount, and addresses who must receive notice of the sale. Additionally, the statute sets forth different requirements for public and private sales. Generally, however, notice must be sent to DMV and to all persons claiming an

interest in the property at least 20 days prior to the sale. The sale also must be advertised according to statute unless the property falls into an exception.

Conclusion

The statutory provisions regarding possessory liens on personal property are fairly intricate and therefore, legal advice is recommended to ensure proper compliance. Many creditors realize that collecting a judgment is sometimes a difficult task; having the leverage available to coerce immediate payment from an unwilling debtor is an essential collections tool.

While this article is meant to be as informative as possible, legal advice is recommended since every fact situation raises different legal issues. Therefore, if you have a specific question or a recurring specific set of facts that raises legal questions, legal counsel should be consulted.



The Necessity of Well-Drafted Agreements

By James A. "Jim" Beck



A typical small business has a handful of moving parts that need to work together effectively in order to help the business achieve its potential. A key component that can help the business operate as intended is well-drafted documentation. Specifically, it is important that a small business have precise, understandable contracts and corporate documents that clearly define the terms, procedures, rights, duties, and obligations of the owners, managers, employees, vendors, and customers. Numerous real world, practical examples illustrate the importance of having well-drafted agreements.

Often, the intentions of the parties to a contract are not appropriately documented. For example, business partners may make an agreement regarding the operation of the company and how decisions are made, but the agreement is not specifically put in a contract. A dispute then arises, and the only writing upon which the parties can rely is either a generic, boilerplate operating agreement or no writing at all. Each partner is then forced into expensive litigation and has to take his chances that a court will agree with his side of the story.

Business owners may establish a limited liability company (LLC) through which the business operates in order to shield the owners from personal liability. However, in many instances, the LLC does not own any assets—the assets of the business owners are used to operate the business. An

example of this is a situation where the business owner personally purchases equipment for use in the business, and the LLC pays the business owner each month for use of that equipment. Problems can arise for the owners if there is no documentation of this equipment lease. A court may determine that the equipment is an asset of the business that a creditor may seize in recovery of a judgment against the LLC. If the LLC were to file bankruptcy, in the absence of written documentation, the equipment will likely be considered an asset of the LLC, forbidding the owners from disposing of it, and in a Chapter 7 liquidation, the equipment will be sold for the benefit of creditors. The owner would have very little recourse in these situations.

While these are only two common examples of major problems that can arise, they illustrate the necessity and benefit of putting agreements and the specific intentions of the parties in writing. Not all disputes and problems will go away as a result of having well-drafted, precise documents, and a business will not operate smoothly and efficiently all the time. However, putting the intentions, key terms, and important matters in a written document signed by the parties involved will have a positive effect on a business, decrease risk for the business and its owners, and bring clarity to disputes when they do arise.



Enforcement of Foreign Judgments

By James R. Vann



Information for Creditors Regarding Collecting Out-of-State Judgments

Suppose you have a judgment against a debtor and the debtor either leaves the state or owns property in another state. How can you collect on your judgment? The answer to this question lies in a basic understanding of how these “foreign judgments” operate.

Generally, a “foreign judgment” is one that is rendered in another state or country that is judicially distinct from the state where collection of the judgment is sought. Before a foreign judgment can be enforced, certain requirements must be met.

Domesticating a Foreign Judgment

Most states have adopted the Uniform Enforcement of Foreign Judgments Act, which allows a judgment of one state to be enforced in another state, based on the constitutional requirement that “full faith and credit” be given to judgments rendered by other states. Before a judgment of one state may be enforced in another state, however, the judgment creditor (the person in whose favor a judgment is entered) must file a new lawsuit in that state to “domesticate” the foreign judgment. What this means is that a creditor has to register his out-of-state judgment in the new state in order to enforce the judgment under the laws of the new state.

Generally, the creditor must initiate a new lawsuit, after paying the required filing fee, in the district or county where the debtor now resides or owns real property. The lawsuit includes a complaint seeking enforcement of the foreign judgment and gives notice to the debtor that he may contest the enforcement of the judgment. Attached to the complaint is a certified or exemplified copy of the out-of-state judgment. Usually, you will need to obtain several certified or exemplified copies of the judgment in order to file the action. Certified or exemplified copies of the judgment can be obtained from the Clerk of the Court where the judgment was rendered.

Additionally, you may be required to file an affidavit stating that the judgment is final and that the judgment is either wholly or partially

unsatisfied. You may also need to provide the exact amount due, including costs and interest at the originating state’s rate. Usually, the Clerk of Court can provide you with information on what exactly is required in order to register your foreign judgment with that court.

How May a Foreign Judgment be Attacked?

Generally, an out-of state judgment may be attacked by the debtor for lack of personal or subject matter jurisdiction, improper service in the originating state, fraud in the procurement of the judgment, and because enforcement of the judgment would violate the public policy of the state where enforcement of the judgment is sought. Under these defenses, the debtor is arguing either that the judgment was improperly rendered in the first place and therefore should not be registered in the new state or that the new state should not recognize the judgment because it violates public policy.

Judgments Rendered in Federal Court

A federal judgment is enforced in accordance with the practice and procedure of the state in which the federal court is held. You may contact the federal court which rendered your judgment in order to request that a transcript of your judgment be issued and sent to the state court.

Conclusion

Once the debtor is served with your complaint, if the debtor fails to answer the complaint, the Court will “domesticate” your foreign judgment and allow you to collect on it according to that state’s laws. If, however, enforcement of the foreign judgment is contested, you must essentially prove to the court that full faith and credit should be given to your judgment since it was rendered properly. In this event, local counsel is well advised. Once a foreign judgment is registered with the new state, the judgment may be enforced to the same extent as any other judgment rendered originally in that state. Since laws differ among the several states with regard to collection procedures, a creditor may wish to consider hiring local counsel.