

WHAT DEFENSES DOES A TENANT HAVE
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Summary eviction is granted only in undisputed cases.¹ Where a question of fact or a legal defense is found by the court, the court is required to dismiss the summary proceeding and the landlord is left to file a formal civil eviction.

A summary eviction hearing is not an evidentiary hearing, and the rules of evidence are not applied. Courts will generally ask some basic questions to determine if a defense or true question of fact exists. If the court determines that such a defense or questions does exist, the hearing is over.

Additionally, Defenses to raised in the summary eviction hearing, unlike formal eviction, do not have to plead in the answer. The NRS § 40.253(6) states that it doesn't matter what the tenant's affidavit says. The tenant is allowed to bring any defense up at the hearing.

The Landlord is then required to give the tenant the due process of a formal summons and complaint.

The defenses a tenant may raise are:

- A. Payment of Rent
- B. Defects
- C. Habitability
- D. Retaliatory Eviction
- E. Rent Increases that do not Comply with the Lease
- F. Sale and Conversion of the Apartments into Condominiums
- G. Agreement with Parties other than Tenants

¹ NRS § 40.253(6) (2003). ("If the court determines that there is a legal defense as to the alleged unlawful detainer, the court shall refuse to grant either party any relief, and, except as otherwise provided in this subsection, shall require that any further proceedings be conducted pursuant to NRS 40.290 to 40.420, inclusive.")

A. PAYMENT OF RENT

A defense to a 5-day pay or quit notice is the claim that rent has been paid. The tenant can claim that:

1. they paid the rent
2. they attempted to tender the rent but the landlord refused it
3. the amount claimed on the notice is not the correct rent

1. Paid Rent

First there is the defense that rent was paid. If the tenant can show that they paid the rent, there will be no summary eviction. Usually a Justice Court will require more than the tenant's word against the landlord's word. A receipt, copies of checks/money orders, or some other evidence of payment is required. But if the tenant can show something to substantiate the claim, they will at the minimum get more time, and more likely, the summary eviction will be denied leaving the landlord to go the civil eviction route.

2. Tender of Rent

Second, the tenant can claim they tendered the rent but the landlord refused to accept it. If the tenant can show they tendered the rent, there will be no summary eviction. Showing up at the hearing with the rent will also usually keep the tenant on the premises. The landlord is permitted to refuse to accept less than the amount owed.

The landlord may not refuse to accept rent when the charges are for "costs other than rent, a reasonable charge for late payments of rent or dishonored checks, or a security."²

Therefore, in summary eviction, it is a defense to tender rent but not charges for serving the 5-

² NRS § 40.253 (9) (2003). ("A landlord shall not refuse to accept rent from a tenant that is submitted after the landlord or his agent has served or had served a notice pursuant to subsection 1 if the refusal is based on the fact that the tenant has not paid collection fees, attorney's fees or other costs other than rent, a reasonable charge for late payments of rent or dishonored checks, or a security. As used in this subsection, "security" has the meaning ascribed to it in NRS 118A.240.")

day pay or quit and paying a third party to prepare the notice and summary eviction paperwork. Additionally, the tenant can show up to the summary eviction hearing with the money for rent and reasonable late fees and stay on the property.

3. Incorrect Amount on Notice

If the amount on the notice is not backed-up by the lease, the proceedings will be dismissed. The basis for rent and late fees will have to be shown from the lease if the tenant raises this defense.

B. DEFECTS

If the landlord's notice or pleadings do not comply with the requirements of Chapter 40, the tenant can assert this as a defense and have the hearing dismissed.

First, the notice itself has requirements. Any notice for summary eviction must contain:

- (a) Identify the court that has jurisdiction over the matter; and
- (b) Advise the tenant of his right to contest the matter by filing, within the time specified for the payment of the rent or surrender of the premises, an affidavit with the court that has jurisdiction over the matter stating that he has tendered payment or is not in default in the payment of the rent.³

The notice must also contain the proper basis for unlawful detainer, the appropriate amount of days for compliance, and the option to comply (if applicable) or vacate. NRS §§ 40.250-252.

Additionally, the notice must be served properly. For every type of notice, the requirements of NRS § 40.280 (1)⁴ must be followed. (*See Part II supra*). For summary eviction

³ NRS § 40.253 (3) (2003)

⁴ 1. Except as otherwise provided in NRS 40.253, the notices required by NRS 40.251 to 40.260, inclusive, may be served:

- (a) By delivering a copy to the tenant personally, in the presence of a witness;
- (b) If he is absent from his place of residence or from his usual place of business, by leaving a copy with a person of suitable age and discretion at either place and mailing a copy to the tenant at his place of residence or place of business; or
- (c) If the place of residence or business cannot be ascertained, or a person of suitable age or discretion cannot be found there, by posting a copy in a conspicuous place on the leased property, delivering a copy to a person there residing, if the person can be found, and mailing a copy to the tenant at the place where the leased property is situated.

notices, the landlord must, in addition to the requirements of § 40.280, also follow the requirements of 40.280 (3).⁵ A valid defense is showing that those requirements have not been met.

As a practical matter, the clerks of the Justice Courts will not even accept a summary eviction case unless the notice has been properly served. It is a rare case when the tenant has to raise this defense.

Next, the pleadings filed by the landlord have to be proper. The affidavit of complaint must contain the following information:

- 1 The date the tenancy commenced.
- 2 The amount of periodic rent reserved.
- 3 The amounts of any cleaning, security or rent deposits paid in advance, in excess of the first month's rent, by the tenant.
- 4 The date the rental payments became delinquent.
- 5 The length of time the tenant has remained in possession without paying rent.
- 6 The amount of rent claimed due and delinquent.
- 7 A statement that the written notice was served on the tenant in accordance with NRS 40.280.
- 8 A copy of the written notice served on the tenant.
- 9 A copy of the signed written rental agreement, if any.⁶

Again, as a practical matter, if the affidavit of complaint does not contain the proper information, the clerks of the Justices Courts will not accept them. Interestingly, the Las Vegas Justice Court, which has a history of requiring things beyond what the statute requires in summary evictions, does not require a copy of the signed written rental agreement.

Failure to properly file paperwork, and file it in time are a basis for denial of the summary eviction.

⁵ 3. Before an order to remove a tenant is issued pursuant to subsection 6 of NRS 40.253, a landlord shall file with the court a proof of service of any notice required by that section. Except as otherwise provided in subsection 4, this proof must consist of:

(a) A statement, signed by the tenant and a witness, acknowledging that the tenant received the notice on a specified date;

(b) A certificate of mailing issued by the United States Postal Service; or

(c) The endorsement of a sheriff, constable or other process server stating the time and manner of service.

⁶ NRS § 40.253(5)(a) (2003).

C. HABITABILITY

Inhabitability is a favorite defense raised by tenants. There will be few tenants who will claim they have paid their rent, or attempted to, and even fewer who will not to raise procedural defect defenses. The majority of the defenses raised will be habitability defenses.

The Habitability defense only apply to landlords who come under the requirements of Chapter 118A of the Nevada Revised Statutes (Generally, a landlord who owns or manages four or more units).⁷ This defense is statutory, and to use it, the Tenant must show that they qualify under all of the statutory requirements.

Habitability defenses, as the name implies, have to do with living conditions. Certain conditions, if existing and remaining uncorrected, entitled the tenant to either remedy the conditions themselves and deduct rent, or to terminate the lease and vacate. By statute, a dwelling unit is inhabitable if it substantially lacks:

- a Effective waterproofing and weather protection of the roof and exterior walls, including windows and doors.

⁷ NRS 118A.180 Applicability.

1. Except as provided in subsection 2, this chapter applies to, regulates and determines rights, obligations and remedies under a rental agreement, wherever made, for a dwelling unit or premises located within this state.

2. This chapter does not apply to:

- (a) A rental agreement subject to the provisions of chapter 118B of NRS;
- (b) Low-rent housing programs operated by public housing authorities and established pursuant to the United States Housing Act of 1937, 42 U.S.C. §§ 1437 et seq.;
- (c) A person who owns and personally manages four or fewer dwelling units, except with respect to the provisions of NRS 118A.200, 118A.300, 118A.325, 118A.340, 118A.380, 118A.450 and 118A.460;
- (d) Residence in an institution, public or private, incident to detention or the provision of medical, geriatric, educational, counseling, religious or similar service;
- (e) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or his successor in interest;
- (f) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;
- (g) Occupancy in a hotel or motel for less than 30 consecutive days unless the occupant clearly manifests an intent to remain for a longer continuous period;
- (h) Occupancy by an employee of a landlord whose right to occupancy is solely conditional upon employment in or about the premises;
- (i) Occupancy by an owner of a condominium unit or by a holder of a proprietary lease in a cooperative apartment; or
- (j) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes.

- b Plumbing facilities which conformed to applicable law when installed and which are maintained in good working order.
- c A water supply approved under applicable law, which is:
 - 1 Under the control of the tenant or landlord and is capable of producing hot and cold running water;
 - 2 Furnished to appropriate fixtures; and
 - 3 Connected to a sewage disposal system approved under applicable law and maintained in good working order to the extent that the system can be controlled by the landlord.
- d Adequate heating facilities which conformed to applicable law when installed and are maintained in good working order.
- e Electrical lighting, outlets, wiring and electrical equipment which conformed to applicable law when installed and are maintained in good working order.
- f An adequate number of appropriate receptacles for garbage and rubbish in clean condition and good repair at the commencement of the tenancy. The landlord shall arrange for the removal of garbage and rubbish from the premises unless the parties by written agreement provide otherwise.
- g Building, grounds, appurtenances and all other areas under the landlord's control at the time of the commencement of the tenancy in every part clean, sanitary and reasonably free from all accumulations of debris, filth, rubbish, garbage, rodents, insects and vermin.
- h Floors, walls, ceilings, stairways and railings maintained in good repair.
- i Ventilating, air-conditioning and other facilities and appliances, including elevators, maintained in good repair if supplied or required to be supplied by the landlord.⁸

Please note that no where in the statute does it say that mold is an inhabitable condition.

If one of these conditions exist, the tenant then must follow certain statutorily defined procedures. There are two statutes the tenant may proceed under. The amount of the cost to repair the condition determine which statute applies. If the cost of repair is "\$100 or an amount equal to one month's periodic rent" then the tenant uses NRS § 118A.360,⁹ otherwise, the tenant

⁸ NRS § 118A.290 (1) (2003)

⁹ NRS § 118A.360 Failure of landlord to comply with rental agreement or maintain dwelling unit in habitable condition where cost of compliance less than specified amount.

1. If the landlord fails to comply with the rental agreement or his obligation to maintain the dwelling unit in a habitable condition as required by this chapter, and the reasonable cost of compliance or repair is less than \$100 or an amount equal to one month's periodic rent, whichever amount is greater, the tenant may recover damages for the breach or notify the landlord of the tenant's intention to correct the condition at the landlord's expense. If the landlord fails to use his best efforts to comply within 14 days after being notified by the tenant in writing or more promptly if conditions require in case of emergency, the tenant may cause the work to be done in a workmanlike manner and after submitting to the landlord an itemized statement, the tenant may deduct from his rent the actual

uses NRS § 118A.350.¹⁰ Both statutes require similar procedures with the exception of the results. If the repair is less than one month's rent, the tenant may fix it and deduct rent. If the repair cost is more than one month's rent, the tenant may elect to terminate the lease.

The procedure the tenant must follow is:

1. First, the condition may not have been caused by the tenant
2. The tenant must notify the landlord in writing of the condition and give the landlord 14 days to repair it. (Note that time may be shortened "if conditions require in case of emergency.")
3. If the landlord does not repair the condition then:
 - a. if the repair costs less than one month's rent, then
 - tenant may have a licensed contractor fix the problem
 - tenant pays the licensed contractor
 - tenant provides proof payment and invoice to Landlord
 - **AT THAT POINT**, tenant can deduce the amount paid from rent

and reasonable cost or the fair or reasonable value of the work, not exceeding the amount specified in this subsection.

2. The landlord may specify in the rental agreement or otherwise that work done under this section and NRS 118A.380 must be performed by a named person or firm or class of persons or firms qualified to do the work and the tenant must comply with the specifications. If the person qualified to do the work is unavailable or unable to perform the repairs the tenant shall use another qualified repairman.

3. A tenant may not repair at the landlord's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his household or other person on the premises with his consent.

4. The landlord's liability under this section is limited to \$100 or an amount equal to one month's periodic rent, whichever amount is greater, within any 12-month period.

5. A tenant may not proceed under this section unless he has given notice to the landlord that the dwelling is not in a habitable condition as required by this chapter.

¹⁰ NRS 118A.350 Failure of landlord to comply with rental agreement or maintain dwelling unit in habitable condition.

1. Except as otherwise provided in this chapter, if the landlord fails to comply with the rental agreement or fails to maintain the dwelling unit in a habitable condition as required by this chapter, the tenant shall deliver a written notice to the landlord specifying the acts and omissions constituting the breach and stating that the rental agreement will terminate as provided in this section. If the breach is remediable and the landlord adequately remedies the breach or uses his best efforts to remedy the breach within 14 days after receipt of the notice, the rental agreement does not terminate by reason of the breach. If the landlord fails to remedy the breach or make a reasonable effort to do so within the prescribed time, the tenant may:

- (a) Terminate the rental agreement immediately.
- (b) Recover actual damages.

(c) Apply to the court for such relief as the court deems proper under the circumstances.

2. The tenant may not terminate for a condition caused by his own deliberate or negligent act or omission or that of a member of his household or other person on the premises with his consent.

3. If the rental agreement is terminated, the landlord shall return all prepaid rent and security recoverable by the tenant under this chapter.

4. A tenant may not proceed under this section unless he has given notice as required by subsection 1, except that the tenant may, without giving that notice, recover damages under paragraph (b) of subsection 1 if the landlord:

- (a) Admits to the court that he had knowledge of the condition constituting the breach; or
- (b) Has received written notice of that condition from a governmental agency authorized to inspect for violations of building, housing or health codes.

- b. if the repair costs more than one month's rent, then
 - Tenant can terminate the lease

The tenant must follow all of the statutory requirements to assert the defense. The tenant also has the right to seek their damages (in a separate action) if they use the defense or not.

In a summary eviction setting, this defense will stop the hearing and require the summary eviction to be dismissed. Landlords and their attorneys should ensure the judge looks at all of the requirements. A tenant asserting this defense usually is trying to stay and not pay rent, show they will allege a repair of less than one month's rent. Therefore, they must show written notice, that they hired a licensed contractor and paid him before they may assert the defense. Ensure the judge looks at the entire requirements before she or he makes a ruling on dismissing the hearing.

D. RETALIATORY EVICTION

A tenant may also allege a retaliatory eviction as a defense. Retaliatory evictions are prohibited by Nevada Law.¹¹ The following are not bases for eviction:

- a tenant's good faith complaint of a violation of a building, housing or health code applicable
- b tenant's good faith complaint to the landlord or a law enforcement agency of a crime

¹¹ NRS 118A.510 Retaliatory conduct by landlord against tenant prohibited; remedies; exceptions.

1. Except as otherwise provided in subsection 3, the landlord may not, in retaliation, terminate a tenancy, refuse to renew a tenancy, increase rent or decrease essential services required by the rental agreement or this chapter, or bring or threaten to bring an action for possession if:

(a) The tenant has complained in good faith of a violation of a building, housing or health code applicable to the premises and affecting health or safety to a governmental agency charged with the responsibility for the enforcement of that code;

(b) The tenant has complained in good faith to the landlord or a law enforcement agency of a violation of this chapter or of a specific statute that imposes a criminal penalty;

(c) The tenant has organized or become a member of a tenant's union or similar organization;

(d) A citation has been issued resulting from a complaint described in paragraph (a);

(e) The tenant has instituted or defended against a judicial or administrative proceeding or arbitration in which he raised an issue of compliance with the requirements of this chapter respecting the habitability of dwelling units;

(f) The tenant has failed or refused to give written consent to a regulation adopted by the landlord, after the tenant enters into the rental agreement, which requires the landlord to wait until the appropriate time has elapsed before it is enforceable against the tenant; or

(g) The tenant has complained in good faith to the landlord, a government agency, an attorney, a fair housing agency or any other appropriate body of a violation of NRS 118.010 to 118.120, inclusive, or the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq., or has otherwise exercised rights which are guaranteed or protected under those laws.

- c tenant organized or becomes a member of a tenant's union
- d landlord gets a citation resulting from a complaint described in paragraph a
- e tenant instituted proceeding or asserted defense of habitability
- f tenant refused to give written consent to a regulation adopted by the landlord,
- g tenant's good faith complaint to the landlord, a government agency, an attorney or ir housing agency of a violation of NRS 118.010 to 118.120, or the Fair Housing Act of 1968, or has otherwise exercised rights which are guaranteed or protected under those laws.

Tenants will have to show that there is no other basis for the eviction (like non-payment of rent or 30 day no cause).

E. RENT INCREASES THAT DO NOT COMPLY WITH THE LEASE

Rent may only be increased if there is no written agreement that sets the amount of rent. This means the rent is what the lease says it is. If there is no written agreement, or the lease has expired, then rent may be increased upon 45 day notice for month to month tenancies or 15 day notice for less than one-month tenancies.¹² Any attempt to raise the rent with less notice (even if allowed to in the written contract) will not be effective and will be a defense against eviction.

F. SALE AND CONVERSION OF THE APARTMENTS INTO CONDOMINIUMS

When a rental unit is sold and/or converted into condominiums, the lease is very important. Short of a lease term that allows buy-out or eviction upon some notice, the tenant will get to keep the property until the end of the lease. Therefore the tenants lease will be a valid defense.

G. AGREEMENT WITH PARTIES OTHER THAN TENANTS

Again, the lease will rule. If the landlord has made some arrangement with a third party, it will not change or trump the lease with the tenant. The lease will be a valid defense.

¹² NRS 118A.300 Advance notice of increase of rent. The landlord may not increase the rent payable by a tenant unless it serves the tenant with a written notice, 45 days or, in the case of any periodic tenancy of less than 1 month, 15 days in advance of the first rental payment to be increased, advising him of the increase.