

From: Brinkley, Nicole N.

Sent: Tuesday, June 23, 2020 5:55 PM

To: Judicial.NC Judicial Branch

Cc: Smith, Meredith Stone; Dona Lewandowski; Lassiter, Jamie L.; Furr, Justin M.

Subject: RE: Updates for Clerks of Superior Court - Civil, Estates, and Special Proceedings COVID-19

Dear Clerks, Assistant Clerks, and Deputy Clerks of Superior Court,

Chief Justice Beasley issued two orders on Saturday, June 20th. All orders issued by the Chief Justice and the Supreme Court are available at <https://www.nccourts.gov/covid-19>. In response to the issuance of these new orders and a number of questions we have received related to summary ejectment actions, OGC offers the following updated information to assist Clerks of Superior Court in understanding the impact on civil actions, special proceedings, and estates. The previous information provided by email on June 3rd may be found below this email. (NOTE: This communication is being sent through the Branch-wide email address so that individuals who need this information are not inadvertently omitted. I apologize in advance to the unintended recipients who receive this.)

EXTENSION OF TIME TO FILE NOTICE OF APPEAL

On [May 30th](#), Chief Justice Beasley issued an order providing that “[i]n any matter in which the deadline to file a notice of appeal fell between 13 March 2020 and 1 June 2020, the deadline for filing an appeal and making any required payment or bond is hereby **extended to 30 June 2020**.”

Before taking any post-judgment action, such as the issuance of a writ of execution or writ of possession, a clerk should first confirm that the case is not impacted by this order and that the applicable time for filing notice of appeal and making any required bond has not been further extended.

CERTAIN EMERGENCY DIRECTIVES EXTENDED

An [order issued on June 20th](#) extended Emergency Directives 9 through 16 and slightly modified Directives 11 and 13. Emergency Directives 9 through 16 **currently expire on 7/20/20**. This includes Emergency Directive 15, which provides that documents submitted to the clerk by U.S. Mail shall be deemed timely if received by the clerk within five (5) business days of the filing due date.

Pursuant to an [order issued on May 30th](#) Emergency Directives 2 through 8 were extended and **currently expire on 6/29/20**. Emergency Directive 1 was not further extended. Emergency Directive 5, which was extended by this order, continues to permit any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice that is required to be verified or executed under oath or affirmation to be executed by written declaration in substantial conformity to the language in the directive. This directive applies to all documents filed with the court, but does not apply to wills to be probated, conveyances of real estate, or any document that is not to be filed in the General Court of Justice.

SUMMARY EJECTMENT AND OTHER EVICTION ACTIONS

NEW: Emergency Directive 20:

- A [second order issued on June 20th](#) added Emergency Directive 20 which provides courts with greater flexibility in scheduling trials in summary ejectment and small claim eviction actions filed pursuant to Articles 3 and 7 of G.S. Chapter 42. When a plaintiff demands possession in a complaint filed pursuant to Article 3 (summary ejectment) or Article 7

(criminal activity) of G.S. Chapter 42, G.S. 42-28 requires the clerk of superior court to issue a summons requiring the defendant to appear and answer the complaint at a certain time and place not to exceed *seven days from the issuance of the summons, excluding weekends and legal holidays*. Emergency Directive 20 extends the seven (7) business days to **up to 30 days** from the issuance of the summons. The issuance of the summons would not be delayed, but rather the trial date on the summons form, [AOC-CVM-100](#), would be moved out beyond the current seven business day time limit. Emergency Directive 20 currently **expires on 7/20/20**.

- This Directive does not apply to vacation rental evictions under G.S. Chapter 42A.

Emergency Directive 17:

- The stay of summary ejectment and eviction actions pending in the trial divisions in Emergency Directive 17 issued in the [May 30th order](#) has expired and trials in small claim actions seeking possession of real property were allowed to resume on Monday, June 22nd, subject to other Emergency Directives issued to ensure safety protocols such as social distancing.
- The provision in Emergency Directive 17 directed to the Sheriffs' execution and return of pending writs of possession of real property expires June 29th.
- The prohibition of initiating summary ejectment actions in Governor Cooper's Executive Order 142 has also expired, so clerks may begin to see an increase in the number of summary ejectment actions filed.

Emergency Directive 18:

- The CARES Act affidavit requirement in Emergency Directive 18 is still in effect and currently **expires on 6/29/20**. The affidavit is required in all summary ejectment actions, regardless of the basis for filing indicated on the complaint.
- The moratorium in Section 4024(b) of the CARES Act prohibits the initiation of actions to recover possession of a covered dwelling from a tenant based on nonpayment of rent or other fees or charges during the effective period (3/27/20 through 7/25/20). However, there may be a basis *other than nonpayment of rent* for initiating a summary ejectment action.
- If a clerk suspects a plaintiff is filing a new summary ejectment complaint based on nonpayment, in violation of Section 4024 of the federal CARES Act, OGC advises that the clerk accept the filing and not advise the filer as to whether the complaint should or should not be filed. **It is not the duty or responsibility of the clerk, upon the filing of a civil action, to read into the body of a complaint to determine if a plaintiff is violating federal law by initiating the action and either (i) advise accordingly or (ii) refuse the filing.**
- If the plaintiff has legal questions about the CARES Act and any potential consequences that may result from initiating the action, the plaintiff should consult with an attorney and review the CARES Act.
- The clerk should provide the CARES Act affidavit (form AOC-CVM-207) to the plaintiff/agent filing the complaint. The clerk may refer the filer to the requirement in Emergency Directive 18 to file the affidavit with the complaint for actions initiated on or after 6/1/20. The CARES Act affidavit is available at this link: <https://www.nccourts.gov/documents/forms/cares-act-affidavit-summary-ejectment>.

- For cases initiated on or after 6/1/20, a copy of the CARES Act affidavit that is filed with the complaint must accompany the summons and complaint when served on a defendant. Clerks must include a copy of this affidavit with the complaint and summons for service on the defendant(s).
- If the plaintiff fails or refuses to file the affidavit at the time of initiating the action, OGC advises that the clerk accept the filing of the complaint. Emergency Directive 18 does not expressly direct or authorize the clerk to refuse filing a summary ejectment complaint if not accompanied by the affidavit.
- The CARES Act affidavit is not required if the complaint is filed pursuant to Article 7 of G.S. Chapter 42 (criminal or other activity in violation of G.S. 42-63).

TIPS IN DETERMINING WHETHER A WRIT OF POSSESSION FOR REAL PROPERTY MUST BE ISSUED

- I. Cases initiated *prior to March 27th* (pre-CARES Act):
 - A writ of possession may be entered for a judgment entered *prior to March 13th*, subject to the affidavit requirement in [G.S. 42-36.1A](#).
 - OGC advises that a writ of possession should not be issued if the deadline to file notice of appeal *fell between 3/13/20 and 6/1/20, inclusive of those dates*, in the event a notice of appeal is filed by June 30th. It is not clear whether the window of time in the [May 30th order](#) includes March 13th and June 1st. For example, if the deadline to file a notice of appeal fell on March 13th, a defendant could file a notice of appeal and sign an undertaking to pay periodic rent on June 30th.
 - If the defendant previously filed a notice of appeal and an undertaking but has missed a periodic rental payment due to be paid into the clerk's office, the clerk may issue writ upon application of the plaintiff pursuant to [G.S. 42-34\(f\)](#) or [G.S. 42-34.1\(a\)](#).

- II. Cases initiated *on or after March 27th* (CARES Act):
 - For cases initiated on or after 3/27/20, Emergency Directive 18 provides that a writ of possession should not be issued unless a finding is made that the subject property is not a covered property as defined by Section 4024(a)(1) of the CARES Act.
 - In cases initiated on or after March 27th, if a magistrate has entered a judgment for possession but does not add a specific written CARES Act finding in the judgment, it is appropriate for the clerk to (i) rely on the judgment for possession as being valid and enforceable and (ii) imply that the magistrate made this finding since the action was not dismissed and proceed with issuing a writ in the usual manner.

The clerks and NCAOC cannot give legal advice about individual litigants' rights or obligations. This is meant to be general guidance and may not address every scenario within a case. Clerks may contact myself or Matt Kraus with any legal questions in these subject matter areas.

Take care,

Nickie

Nicole Brinkley
North Carolina Judicial Branch

From: Brinkley, Nicole N.
Sent: Wednesday, June 03, 2020 7:48 PM
To: Judicial.NC Judicial Branch
Cc: Smith, Meredith Stone; Dona Lewandowski; Lassiter, Jamie L.
Subject: Updates for Clerks of Superior Court - Civil, Estates, and Special Proceedings COVID-19

Dear Clerks, Assistant Clerks, and Deputy Clerks of Superior Court,

Chief Justice Beasley issued three orders on Saturday, May 30th. These orders are available at <https://www.nccourts.gov/covid-19>. The May 30th orders were issued after OGC's May 29th email guidance for clerks of superior court in civil actions, special proceedings, and estates. In response to the issuance of these new orders and questions we have received, OGC offers the following information and FAQs to assist Clerks of Superior Court. (NOTE: This communication is being sent through the Branch-wide email address so that individuals who need this information are not inadvertently omitted. I apologize in advance to the unintended recipients who receive this.)

EXTENSION OF TIME TO FILE NOTICE OF APPEAL

On [May 30th](#), Chief Justice Beasley issued an order providing that “[i]n any matter in which the deadline to file a notice of appeal fell between 13 March 2020 and 1 June 2020, the deadline for filing an appeal and making any required payment or bond is hereby **extended to 30 June 2020**.”

CERTAIN EMERGENCY DIRECTIVES EXTENDED

A [separate order](#) issued on May 30th extended Emergency Directives 2 through 8, and these currently expire on 6/29/20. Emergency Directive 1 was not further extended. Emergency Directive 5, which was extended by this order, continues to permit any pleading, motion, petition, supporting affidavit, or other document of any kind to be filed in the General Court of Justice that is required to be verified or executed under oath or affirmation to be executed by written declaration in substantial conformity to the language in the directive. This directive applies to all documents filed with the court.

G.S. CHAPTER 45 POWER OF SALE FORECLOSURES

Q. May clerks of superior court conduct power of sale foreclosure hearings?

A. Yes. Emergency Directive 17 stays “[a]ll evictions pending in the trial divisions.” A power of sale foreclosure hearing is not an eviction proceeding, but rather a proceeding to authorize or not authorize a trustee or substitute trustee to proceed with the foreclosure pursuant to the terms of a deed of trust and North Carolina law. However, clerks of superior court should consult the Emergency Directives issued by Chief Justice Beasley in the order issued [May 21st](#) intended to reduce court facility occupancy and allow sufficient space for social distancing when scheduling in-person hearings.

SUMMARY EJECTMENT AND OTHER EVICTION ACTIONS

1. Q. Does the stay in Emergency Directive 17 apply to new actions initiated on or after 6/1/20?

A. Yes.

- Emergency Directive 17 in a third order [issued May 30th](#) provides that “[a]ll evictions pending in the trial divisions, whether summary ejectment or otherwise, are hereby stayed **until 21 June 2020**.”

- This includes (i) summary ejectment actions pursuant to Art. 3 of G.S. Chapter 42, (ii) evictions based on criminal activity in Art. 7 of G.S. Chapter 42, and (iii) vacation rental evictions under G.S. Chapter 42A.
 - Emergency Directive 17 does not prohibit the filing of new summary ejectment or other eviction actions.
 - OGC has received clarification from the Chambers of the Chief Justice that cases initiated on or after 6/1/20 are also subject to the stay and should not proceed in court until the expiration of this stay.
2. **Q. The plaintiff is trying to file a new summary ejectment complaint based on nonpayment that, I believe, is in direct violation of Governor Cooper’s Executive Order 142. Should I refuse the filing?**
- A. No. OGC advises that the clerk accept the filing.
- Executive Order 142 (EO 142) issued by Governor Cooper on May 30th ordered an eviction moratorium.
 - Section 1(B)(1) of the EO 142 orders, in part, that “Residential Landlords shall not, for reason of late payment or nonpayment, initiate or take any action to further summary ejectment or other eviction proceedings against a Residential Tenant.”.
 - Section 1(C)(1) prohibits a landlord from taking any action, judicial or otherwise, to terminate a commercial tenant’s possession if (i) the landlord is aware the late or nonpayment is caused by the COVID-19 pandemic or (ii) the commercial tenant provides documentation or other evidence that the late or nonpayment is caused by the COVID-19 pandemic.
 - It is not the duty or responsibility of the clerk, upon the filing of a civil action, to determine whether a plaintiff has violated a provision of Executive Order 142. The filing should not be refused.
3. **Q. The plaintiff is trying to file a new summary ejectment complaint based on nonpayment that, I believe, is in direct violation of Section 4024 of the federal CARES Act because the property participates in the Section 8 Voucher program. Should I refuse the filing?**
- A. No.
- OGC advises that the clerk accept the filing. It is not the duty or responsibility of the clerk, upon the filing of a civil action, to determine whether a plaintiff has initiated an action in violation of Section 4024 of the CARES Act. The filing should not be refused.
 - The CARES Act affidavit (form AOC-CVM-207) should be provided to the plaintiff. The clerk may refer the filer to the requirement in Emergency Directive 18 to file the affidavit with the complaint for actions initiated on or after 6/1/20.
 - A copy of the CARES Act affidavit that is filed with the complaint must accompany the summons and complaint when served on a defendant. Clerks must include a copy of this affidavit with the complaint and summons for service on the defendant(s).
 - The new CARES Act affidavit, form AOC-CVM-207, was released today and is available at this link:
<https://www.nccourts.gov/documents/forms/cares-act-affidavit-summary-ejectment>
4. **Q. If a plaintiff fails or refuses to file the CARES Act affidavit with the complaint at the time of filing, should the clerk refuse to file the complaint.**

- A. No.
- For cases initiated on or after 6/1/20, Emergency Directive 18 requires the plaintiff to file the CARES Act affidavit at the same time the complaint for summary ejectment is filed so that it can be served with the complaint and summons on the defendant(s).
 - OGC advises that the clerk provide new form AOC-CVM-207 'CARES Act Affidavit (Summary Ejectment)' to the plaintiff and direct the plaintiff to the provision in Emergency Directive 18 requiring the affidavit.
 - If the plaintiff fails or refuses to file the affidavit at the time of initiating the action, OGC advises that the clerk accept the filing. Emergency Directive 18 does not expressly direct or authorize the clerk to refuse filing a summary ejectment complaint if not accompanied by the affidavit.
 - The CARES Act affidavit is not required if the complaint is filed pursuant to Article 7 of G.S. Chapter 42 (criminal or other activity in violation of G.S. 42-63).
 - The CARES Act affidavit, form AOC-CVM-207 is available at this link:
<https://www.nccourts.gov/documents/forms/cares-act-affidavit-summary-ejectment>

5. Q. Can the plaintiff file the CARES Act affidavit at a later date for any SUME cases that were initiated on or after 6/1/20 (Emergency Directive 18)?

- A. If a CARES Act affidavit is presented for filing after the filing of the complaint, OGC recommends the clerk accept the filing. The clerk should not advise a party or attorney whether or how the timing of the filing of the affidavit impacts the case.

6. Q. Should SUME cases involving the CARES Act be continued until June 21st (Emergency Directive 17) or after July 25th (CARES Act expiration). Does the Clerk decide this or can the plaintiff ask the clerk to schedule after July 25th?

- A. It is not the responsibility of the clerk to review the CARES Act affidavits when filed. The plaintiff does not typically choose the court date. The court hearing should be scheduled in accordance with the Chief Justice's Emergency Directives, including Emergency Directive 17, and county scheduling protocol. The moratorium in Section 4024(b) of the CARES Act does not stay summary ejectment actions pending before 3/27/20 (effective date) or filed after 3/27/20, but rather prohibits the initiation of summary ejectment actions for nonpayment related to a covered dwelling, effective 3/27/20 through 7/25/20.

The clerks and NCAOC cannot give legal advice about individual litigants' rights or obligations. This is meant to be general guidance and may not address every scenario within a case. Clerks may contact myself or Matt Kraus with any legal questions in these subject matter areas.

Take care,

Nickie



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