



What are the current limits on filing and/or pursuing an eviction action against one of my residential tenants?

The economic effects of the coronavirus pandemic are well known to property managers across North Carolina. According to a report issued by the National Multifamily Housing Council, the ratio of tenants nationally who don't pay their rent in a given month increased in April from a "normal" of one in five to almost one in three.

While the potential for filing an eviction action would ordinarily provide landlords with leverage to convince tenants to pay their rent, the ability to file a summary ejectment action, as well as the ability to obtain an order for possession, have both been impacted by recent developments at the state and federal level. This article will answer several questions we have recently received on the subject, and will address what landlords and property managers can and cannot do in the current economic environment.

QUESTION: What actions have been taken by North Carolina officials that impact my ability to file or pursue a new eviction action?

ANSWER: One fact to clarify: unless a property owner is barred by the Coronavirus Aid, Relief, and Economic Security ("CARES") Act (see discussion below), there is no prohibition on the filing of a new summary ejectment action in North Carolina. Courthouses are open in every county and clerks are accepting new filings. Getting a hearing date is another story.

On March 13, 2020, Cheri Beasley, the Chief Justice of the Supreme Court of North Carolina, issued the first of several orders relating to court proceedings in this state. Her order mandated that all court proceedings be rescheduled to a date no sooner than April 17. On March 19, Chief Justice Beasley signed a second order, this one stating that all pleadings that were due on or after March 16 would be deemed timely filed if filed by April 17.

On March 31, 2020, Governor Roy Cooper issued an Executive Order directed to four segments of the North Carolina economy. Section 3 of that order is entitled "Guidance Concerning Eviction Proceedings." Included in his "guidance" is the statement that "there should be no new eviction proceedings" until the expiration of Chief Justice Beasley's March 13 and March 19 orders. The Governor noted that while the then-current expiration date of those orders was April 17, that date could be extended by a further order of the Chief Justice.

On April 2, Chief Justice Beasley did in fact extend the expiration date of her earlier orders. Her April 2 order notes that all court proceedings must be scheduled or rescheduled for a

date no sooner than June 1. There are some limited exceptions. One is for cases seeking emergency relief such as a domestic violence protective order. There is also an exception for remote proceedings. However, the April 2 order states that remote proceedings may only be conducted with the consent of all parties.

The clerks we have consulted have advised us that, thus far, no landlord has attempted to obtain an eviction hearing by alleging that they are dealing with an emergency. These clerks also advised us that they have not received any guidance concerning what facts might constitute enough of an emergency that a landlord could obtain a hearing. Under the circumstances, it is safe to assume that by virtue of the orders of Chief Justice Beasley and Governor Cooper, there will be virtually zero hearings in an eviction case in North Carolina until June 1 at the earliest.

QUESTION: Since getting a hearing any time soon won't happen, are there other options my owner-clients should consider?

ANSWER: In his March 31 Executive Order, Governor Cooper suggested that property owners work with their tenants to implement payment plans and avoid evictions. We agree with this advice. Many property managers we have talked with have already taken steps to reach out to their tenants to have conversations about how the COVID-19 pandemic has affected them financially. In some cases, if the tenant can document a loss of income, some or all of the required rent has been deferred for an agreed-upon period of time. In other cases, tenants wishing to terminate their leases early have been willing to do so on terms that are acceptable to the landlord. Conversations on these subjects will likely be appreciated by all parties.

QUESTION: Assuming that my client wants me to proceed with an eviction action (and the CARES Act permits me to do so) should I wait until June 1 to file? Or is there an advantage to filing right away?

ANSWER: There is no advantage to waiting. Even if you file an eviction action now, you will be entitled to recover any rent that becomes due up to the date of your hearing. Paragraph 6 of the standard AOC form used for filing summary ejectment actions states that the plaintiff's request for relief includes not only the rent due on the date of filing but also the "daily rental until entry of judgment."

There is one possible benefit to filing now: it may enable you to get an earlier hearing date. This benefit may depend on where the managed property is located. We have taken a limited survey of property managers around the state and found that clerks are handling newly-filed eviction cases in different ways.

In some counties, newly-filed eviction cases are being given court dates in the order that the cases were or are filed. Cases filed prior to April 2 that had previously been scheduled for hearing have been given new hearing dates in early June. Cases filed since April 2 have been given hearing dates later in June. In these counties, the sooner a case is filed, the earlier the hearing date will be.

In other counties (including Mecklenburg), the clerk is not notifying the filing party of the hearing date for their newly-filed cases. Instead, the clerk is holding on to the paperwork in those cases. It appears that the clerks in these counties will assign hearing dates at some later time. In those counties, it is impossible to know if hearing dates will be assigned on a filing date basis.

QUESTION: What about eviction cases where I obtained an order for possession prior to March 13? Can I get a writ of execution issued by the clerk and served by the Sheriff?

ANSWER: Once again, this may depend on where the managed property is located.

In Section 3 of his March 31 Executive Order, Governor Cooper noted that the clerks in each county had the discretion (i.e. not the obligation) to delay issuing Writs of Possession until regular court operations resume. His order states: “The undersigned and the Attorney General strongly encourage all Clerks of Superior Court to... hold the issuance of all Writs of Possession of Real Property until April 17 or any later date subsequently ordered.” We know that in some counties (Mecklenburg included), clerks are following the Governor’s suggestion and exercising their discretion NOT to issue Writs at this time.

Governor Cooper’s Executive Order also “strongly encourages” sheriffs to delay the execution of any Writs of Possession that had already been issued until regular court operations resume. We know that in some counties (Mecklenburg included), sheriffs are following the Governor’s suggestion and suspending their enforcement of court-ordered evictions until June 1, 2020.

QUESTION: How does the CARES Act impact my ability to pursue an eviction action against a residential tenant?

ANSWER: The CARES Act does not excuse tenants from their contractual obligation to pay rent. However, it does grant certain residential tenants relief from eviction proceedings that are based on nonpayment of rent. The Act does not provide relief for commercial tenants.

Residential tenants who live in properties with federally-backed mortgages are the ones who are covered by the CARES Act. Section 4024(b) of the Act states that during the 120-day period beginning on March 27, 2020, the lessor of a “covered dwelling” may not (a) initiate a legal action to recover possession of that dwelling from the tenant due to nonpayment of rent, or (b) charge the tenant any fees, penalties, or other charges related to the non-payment of rent. Section 4024(c) requires landlords to give their tenants 30 days’ advance notice before requiring their tenants to vacate, and prohibits the issuance of the required notice until the expiration of the 120-day period. Taken together, this means that if the CARES Act applies to a property you manage, you may not commence an eviction action until August 24.

What are “covered dwellings”? They include any property that has a “federally backed mortgage loan” or a “federally backed multifamily mortgage loan.” The Act defines “federally backed mortgage loans” as loans secured by a lien on residential properties designed for

occupancy of from one to four families and that are made, insured or guaranteed by any officer or agency of the Federal Government or under any program administered by HUD, or are purchased or securitized by “Freddie Mac” or “Fannie Mae.” A “federally backed multifamily mortgage loan” has a similar definition except that it is secured by property designed for the occupancy of five or more families.

Before filing an eviction action, you should consult with your owner-client to be sure that the property is not considered a “covered dwelling”. Interestingly, the CARES Act does not include penalties for a landlord who violates the moratorium. However, it is possible the magistrate will ask about the owner’s financing and, if so, deny your request for possession based on the Act’s provisions.

QUESTION: If my landlord clients have a “covered dwelling” and cannot pursue eviction of their tenants for nonpayment of rent, how are they supposed to pay their mortgages?

ANSWER: The CARES Act does provide some relief for landlords as well as tenants. Sections 4022 and 4023 of the Act give owners of single-family and multifamily properties with federally backed mortgage loans the right to seek “forbearance”¹ from their lender. The rights of those owners vary depending on whether the property is single-family or multifamily.

For single-family properties, relief is governed by Section 4022. Relief is requested by certifying to the loan servicer that the borrower is “experiencing a financial hardship during the COVID-19 emergency.” Upon receiving such a request, lenders must grant forbearance for up to 180 days. That period may be extended, upon the borrower’s request, for an additional 180 days). For owners of multifamily properties, it is Section 4023 that applies. Relief is limited to borrowers with loans that were current on their payments as of February 1, 2020. Forbearance is granted upon receipt of an oral or written request, and an affirmation that the borrower is experiencing a financial hardship during the COVID-19 emergency. The initial forbearance is limited to 30 days but can be extended for up to two additional 30-day periods upon the request of the borrower.

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¹ In the context of a loan, forbearance generally refers to the postponement or reduction of loan payments