



## SUMMARY EJECTMENT UPDATE – APRIL 2021

As noted in the last two issues of the PMD Newsletter, a number of Federal and State laws, orders, and directives have been enacted and issued over the past months that have affected the summary ejectment process. Some of them are still fully in effect, while others have expired but continue to affect summary ejectment actions to a greater or lesser extent. The purpose of this article is to update the effects that these laws, orders, and directives continue to have (or no longer have) on summary ejectments. **The most recent developments are highlighted.**

Given the continuing uncertainty of the extent and duration of the Pandemic's effects on the Country and the economy, it is important for property managers to stay tuned for future developments affecting residential leases and the eviction process.

**NOTE: On April 19, 2021, the Consumer Financial Protection Bureau (the "CFPB") issued an interim final rule in support of the CDC eviction moratorium. For a summary of the new CFPB rule and its effect on summary ejectment, see the separate article in this edition of the Quarterly.**

### CDC Order

Effective September 4, 2020, the Centers for Disease Control ("CDC") issued an order ("Order") to temporarily halt evictions for nonpayment of rent. The Order may be viewed by clicking [here](#). The Order applies to any property leased for residential purposes, excluding any hotel, motel, or other guest house rented to a temporary guest or seasonal tenant. The Order was originally effective through December 31, 2020. It was extended through January 31, 2021 as a part of a nine hundred-billion-dollar COVID-19 stimulus bill enacted by Congress and signed by then-President Trump in late December. President Biden by Executive Order extended the CDC eviction moratorium through March 31, 2021. **The President has more recently again extended the eviction moratorium, this time through June 30, 2021.**

The Order prohibits any action to remove or cause the removal of a "covered person" from a residential property for nonpayment of rent. A "covered person" is any residential tenant who provides a written declaration certifying, under penalty of perjury, that they:

- Have used best efforts to obtain all available government assistance for rent or housing;

- Expect to earn no more than \$99k (individual) or \$198k (joint) in 2020; OR was not required to report income in 2019; OR received an Economic Impact Payment from the CARES Act;
- Are unable to pay the full rent or housing payment due to substantial loss of household income, loss of hours, lay-off, or extraordinary medical expenses;
- Are using best efforts to make timely partial payments; and
- Eviction would likely render them homeless or force to move into close quarters in congregate or shared living settings due to no other housing options.

A sample Declaration form for tenants to use is attached to the CDC Order. According to the CDC Order, the Declaration (or a similar declaration) must be signed by each adult listed on the lease (but see summary of Governor Cooper's Executive Order 171 below).

The Order does *not* relieve tenants of the obligation to pay rent or make a housing payment and follow other terms of the lease. Landlords may charge late fees, penalties and interest for any missed payments, and may still evict tenants for reasons other than nonpayment of rent.

The Order is enforceable through criminal penalties to individuals of up to \$100,000 to \$500,000 per event and one year in jail, and to organizations of no more than \$200,000 per event if the violation does not result in a death or \$500,000 per event if the violation results in the death of an evicted person from COVID-19.

It is unclear whether the Order prohibits only the physical removal of a covered tenant pursuant to an order of possession, or whether it also prohibits the filing and hearing of a summary ejectment action, and the entry of an order for possession. Given this uncertainty and the potential penalties for violating the Order, it is recommended that landlords and property managers cease any action in furtherance of summary ejectment for nonpayment of rent upon receipt of a signed Declaration from the tenant, whether it is provided in advance of or during the course of a summary ejectment action. Having said that, note below in the summary of Governor Cooper's Executive Order 171 that a landlord who believes an eviction should continue after receiving a Declaration has the right to submit a response to the Declaration and have a hearing on why the eviction should continue. Presumably, this would include the ability of the landlord to challenge the veracity of one or more of the tenant's representations in his or her Declaration, and that the eviction could proceed if the magistrate or judge ruled that the tenant's Declaration was deficient.

An NAR summary of the CDC Order can be accessed by clicking [here](#).

### **Governor Cooper's Executive Order 171**

On October 30, 2020, Governor Cooper's [Executive Order 171](#) became effective. The order extended and expanded the applicability of the CDC Order (summarized above) in North Carolina. Initially effective through December 31, 2020, EO 171 was extended through January 31, 2021 by Executive Order 184, and again through March 31, 2021 by Executive Order 191. **EO 171 has again been extended, this time through June 30, 2021, by EO 206.**

In addition to the requirements of the CDC Order, EO 171 imposes the following additional, and in some instances, slightly different requirements:

- In any eviction action commenced on or after October 30, 2020, the landlord must execute an affidavit and present it to the court certifying that the landlord has provided the tenant with a blank copy of the Declaration in the CDC Order. (NOTE: The NC Administrative Office of the Courts has recently issued a new affidavit form that may be used to satisfy this requirement. The name of the form is “Affidavit As To CDC Declaration Form” (AOC form AOC-CVM-208), which may be accessed by clicking [here](#).)
- Notwithstanding what the CDC Order states, only one Declaration from one tenant in the household is required under EO 171.
- Whether the eviction action was pending or commenced on or after October 30, 2020, if the landlord receives an executed Declaration from a tenant, the landlord must immediately notify the court and submit a copy to the court within 5 days of receipt.
- Upon receiving a Declaration, the landlord shall take no actions to request a writ of possession and is not entitled to the writ.
- If the landlord believes the eviction should continue after receiving a Declaration, the landlord must submit a response to the Declaration identifying in writing why the landlord believes the eviction can continue in spite of the CDC Order protections. Since evictions on other grounds besides non-payment of rent can continue even if a Declaration is received and filed with the court, the landlord may state such reasons. The court must then have a hearing to determine whether the action should proceed.
- Once the landlord receives an executed Declaration, the landlord cannot take action to obtain a writ of possession. The landlord must first file a response and await the court’s hearing and judgment on the response to the Declaration. If the court allows the eviction to continue after the hearing, then the landlord may obtain a writ of possession.
- HOPE Program eligible tenants are entitled to protection under EO 171, even if they otherwise do not qualify for protection under the CDC Order.

A violation of EO 171 is a class 2 misdemeanor, which is the same punishment applicable for violating any Executive Order from the Governor. Landlords and property managers are therefore encouraged to read it carefully and comply with its requirements when pursuing an eviction.

### **CARES ACT**

Effective March 27, 2020, the Federal CARES Act placed a 120-day moratorium on the filing of any action by the lessor of a “covered dwelling” (primarily any property that has a federally backed mortgage loan or a federally backed multifamily mortgage loan) to evict a tenant for non-payment of rent that came due during the period of the moratorium. The Act prohibited charging a tenant any fees, penalties, or other charges related to the non-payment of rent that came due during the period of the moratorium. The Act also required landlords to give their tenants 30 days’ advance notice before requiring their tenants to vacate, and prohibited the issuance of the required notice until the expiration of the 120-day period. Taken together, this meant that if the CARES Act applied, an eviction action for nonpayment of rent that came due during the period of the moratorium could be commenced on or after August 24<sup>th</sup>.

Even though the 120-day moratorium has been over for several months, the CARES Act still applies in the following situations:

- **Eviction by multifamily borrower receiving loan forbearance.** Section 4023(d) of the Act states that any multifamily borrower who receives forbearance on their loan may not, for the duration of the forbearance “evict or initiate the eviction of a tenant from a dwelling unit located in or on the applicable property.” A request for forbearance may be made any time up until the earlier of (a) the termination date of the current national emergency, or (b) December 31, 2020. Since the “current national emergency” did not terminate prior to December 31, 2020, Section 4023 will permit multifamily borrowers to seek forbearance at any time up to December 31<sup>st</sup>. 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. Thus, a multifamily borrower who sought forbearance at the end of 2020 could be entitled to forbearance under the CARES Act through the end of March 2021, in which case they could not file an eviction action for nonpayment of rent during that period.
- **Judgments for unpaid rent due during 120-day moratorium.** As noted above, the CARES Act prohibited charges of fees, penalties, or other charges related to the non-payment of rent that came due during the period of the moratorium (March 27, 2020 through July 24, 2020). That provision of the CARES Act still applies, and thus should be taken into consideration by a landlord who seeks unpaid rent that came due during that 120-day period.

#### **CARES Act Affidavit**

Emergency Directive 18 (“ED 18”) was first issued by then-NC Supreme Court Chief Justice Beasley on May 30<sup>th</sup>. It stated that no writ of possession shall issue in any summary ejectment case filed after March 27 unless a finding is made that the property which is the subject of the complaint is not a covered property as defined in the CARES Act. Pursuant to ED 18, the Administrative Office of the Courts (the “AOC”) developed a form affidavit to be completed by plaintiffs in all post-March 27 eviction actions. Then-Chief Justice Beasley extended the expiration date of ED 18 several times, by virtue of which the requirement to file a CARES Act Affidavit with all new eviction proceedings remained in place until January 14, 2021. Newly-elected Chief Justice Paul Newby allowed ED 18 to expire on January 14, 2021, as a result of which the CARES Act Affidavit is no longer required with new eviction actions.

#### **Executive Order 142**

On May 30, 2020, Governor Cooper issued Executive Order no. 142 (“EO 142”). EO 142 placed limits on the filing of eviction actions by residential landlords for nonpayment of rent. EO 142 was effective for 21 days, through June 20, and was not extended. However, it prohibited residential landlords from charging tenants late fees or other penalties for late payment or nonpayment of any rent that came due during the twenty-one day period of the Order. In addition, the Order required residential landlords to give their tenants up to six months to pay any rent that came due during the twenty-one-day period. Since the 6-month period of time to pay rent that came due during the twenty-one day period expired at the end of last year, landlords are no longer prohibited by EO 142 from seeking to recover unpaid rent for that period of time, although they are still prohibited from charging late fees or other penalties on rent that came due during that time.

### **Emergency Directive 15**

Emergency Directive 15 (“ED 15”) was first issued by NC Supreme Court Chief Justice Beasley on May 21<sup>st</sup>. The purpose of ED 15 was to help minimize foot traffic in the courthouses by encouraging attorneys and litigants to submit filings by mail to the greatest extent possible. Under ED 15, pleadings and other documents delivered by the United States Postal Service to the clerk of superior court are be deemed timely filed if received within five business days of the date the filing is due. Among other things, this means that a tenant who appeals an order of possession issued by the magistrate has an additional five days within which to file the appeal.

ED 15 was extended several times by former Chief Justice Beasley. **ED 15 has been extended twice by new Chief Justice Newby and thus remains in effect. The current expiration date is May 9, 2021.**

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