

# Procedure & Timeline for Summary Ejectment Actions

Complaint filed with clerk of court in county in which tenant resides. Action must be filed in name of property owner, but agent having personal knowledge of facts may sign complaint.

Clerk will accept complaint and set trial date within 7 days, not counting weekends and holidays. (Thirty days for all other small claims actions.)

The clerk issues a summons, which informs the defendant of the lawsuit and the time and place of hearing. The plaintiff may choose to serve by registered or certified mail, signature confirmation, or designated delivery service. If so, plaintiff must provide magistrate with signed receipt and affidavit of service. (Form AOC-CV-662, available at [www.nccourts.org](http://www.nccourts.org), under “Forms.”)

If plaintiff does not choose this option, the clerk will send the complaint and summons (referred to as *process*) to the sheriff for service.

Upon receipt of process, sheriff is required to mail a copy by first class mail by end of next business day “or as soon as practicable.” The officer must go to the defendant’s residence within five days—but at least two days prior to the trial date—“at a time reasonably calculated to find the defendant at the place of abode” to attempt personal service. If unable to serve the defendant personally, the officer must post the process on the premises (*service by posting*).

If service is by posting and the defendant does not appear at trial, the magistrate has authority only to award possession of rental premises. Personal service is required in order for a judicial official to award a money judgment. A landlord who files an action for money and possession must make a choice when service is by posting: if the landlord wishes to delay trial in order to pursue personal service, the landlord may ask the magistrate for a *continuance*. A landlord who does not want to delay regaining possession of the property may drop the claim for money damages and bring a later lawsuit for those damages. Sometimes a plaintiff will ask the magistrate to formally *amend* the complaint to reflect this modification.

Small claims law requires that plaintiffs produce evidence in support of their claims even when the defendant does not appear at trial. The sole exception to this general rule is available to plaintiffs seeking summary ejectment. These plaintiffs may

obtain a judgment of possession without producing any evidence if all the following requirements are satisfied:

1. The plaintiff requests *judgment on the pleadings* in open court;
2. The defendant has been served;
3. The defendant is not present in court and has not filed an answer; and
4. The basis for summary ejectment, as reflected by the complaint, is failure to pay rent in violation of a lease containing a forfeiture clause.

The availability of judgment on the pleadings may mean plaintiffs, especially those having a number of cases, spend much less time in court. However, magistrates are not authorized to award money judgments in cases decided under this provision. A plaintiff seeking both possession and a money judgment must, as usual, support the request for money with evidence.

At the close of the evidence, the magistrate may either announce the judgment in open court or, in complex cases, *reserve judgment*. If the magistrate reserves judgment, s/he is required to mail a copy of the judgment to the parties within five business days.

If the plaintiff/landlord obtains a judgment awarding him or her possession, the law provides that that judgment does not become final and enforceable for ten days. During that ten-day period, either party may give notice of appeal if dissatisfied with the magistrate's decision. That ten-day time limit is strictly enforced. Notice of appeal may be given in open court, or by going to the clerk's office and filing written notice. The appealing party has 10 days in which to pay costs of appeal [exception for indigent appellants—see GS 7A-228 (b) and (b1)], and to request a jury trial if desired. The non-appealing party also has the right to ask for trial by jury. GS 7A-230.

At the end of ten days, if the tenant has not given notice of appeal, the plaintiff may initiate enforcement of the judgment by asking the clerk to issue a *writ of possession*. [Note: a plaintiff who waits longer than 30 days to seek a writ is required to sign an affidavit swearing that s/he has neither entered into a formal lease with the defendant nor accepted rent money from the defendant "for any period of time after entry of judgment." The clerk will not issue a writ unless the landlord signs the affidavit.]

The sheriff is required to enforce the writ of possession within 5 days after receiving it.

If either party appeals the magistrate's judgment, the case will be heard *de novo* in district court. A *de novo* hearing is an entirely new trial, as though the case had never been heard in small claims court. On appeal, either party may ask that the case be tried at the first session after the appeal has been docketed, but the court has discretion to first try other pending cases if deemed necessary. GS 42-

34(a). Unless a continuance has previously been granted, the court must grant a continuance if a party seeks discovery, asks the court to allow further pleadings, or moves for summary judgment.

The 2013 General Assembly enacted GS 7A-228(d), establishing a new procedure allowing the court to dismiss an appeal by defendant on motion of plaintiff demonstrating defendant has failed to participate in the action in a number of enumerated ways. The procedure requires the plaintiff to serve defendant with a motion containing the information that failure to respond within 10 days may result in the appeal being dismissed without a hearing. If defendant fails to respond to the motion, the court may dismiss the appeal upon reviewing the file and determining that the statutory requirements have been met.

While an appeal is pending in district court, a plaintiff may elect to dismiss the case, and the effect is to essentially erase the judgment of the magistrate. Note that this is a Rule 41 voluntary dismissal of the case, as opposed to a dismissal of the appeal. *First Union National Bank v. Richards*, 90 NC App 650 (1988).

At trial, the usual, more formal, rules of district court apply. At the district court level, corporate parties must be represented by an attorney. *Lexis-Nexis v. Travishan Corp.*, 155 NC App. 205 (2002).

One of the most confusing procedural topics in summary ejectment concerns the tenant's right to occupy the rental property during the pending appeal of a judgment awarding possession. Appeal by a tenant/defendant does not automatically delay the plaintiff's right to recover possession of the rental property. Nothing else appearing, the plaintiff is free to pursue eviction following the expiration of the 10-day notice of appeal period. In such a case, GS 42-35 and 42-36 provide that a tenant who wins on appeal is entitled to be restored to possession and to recover damages caused by his removal.

There is a procedure, however, which permits a tenant to continue to occupy rental property pending appeal. GS 42-34. That procedure has three components:

- (1) the tenant must pay into the clerk's office any unpaid rent that both parties agree is owed (*undisputed rent*). Thus, if the plaintiff contends that the tenant owes \$1000 in back rent, but the defendant claims that the correct amount is \$500, the tenant must pay \$500 into the clerk's office. [Note: this requirement does not apply to tenants found to be indigent by the court.]
- (2) if the action for summary ejectment was based on failure to pay rent, and the judgment of the magistrate was entered more than 5 working days before the end of the rental period, the appellant must pay that prorated amount to the clerk's office.

- (3) The tenant must sign an undertaking to continue to make the rent payments, as they come due, to the clerk's office. Failure to make a payment within five days of the due date results, at the plaintiff's request, in termination of the stay, permitting immediate enforcement of the judgment for possession.

It is common for parties as well as clerks and other court personnel to confuse a situation in which the tenant fails to obtain—or maintain—a stay and that in which a tenant's appeal is in jeopardy. For example, a tenant who gives notice of appeal and pays costs within 10 days might appear on Day 12 seeking a stay. If the plaintiff has obtained a writ of possession, the clerk will refuse to issue the stay, but this has no impact on the pending appeal. (And if the plaintiff has not yet obtained a writ of possession, the clerk should issue the stay.) *See Fairchild Properties v. Hall*, 122 NC App 286 (1986).

GS 42-34.1 provides further instructions for the period immediately following the district court trial:

- If tenant has obtained a stay pending appeal and the district court rules in favor of the plaintiff-landlord, the tenant must continue to pay rent to the clerk as required by the undertaking during the 30-day period following judgment. Despite the general rule prohibiting enforcement of judgments during the 30-day appeal period, a tenant who fails to comply with the undertaking during this period is subject to eviction.
- If the landlord prevails at the district court level and there is no appeal, the tenant must pay for the period of possession following the judgment. In addition, the clerk must disperse any amount of rent in arrears in accordance with the stipulation of the parties or, failing that, as directed by the judge.
- If the landlord prevails in district court and tenant appeals, enforcement of the district court judgment is stayed so long as the tenant continues to comply with the requirements of the undertaking. The clerk is not authorized to disperse rent in arrears until all appeals have been resolved. If the tenant fails to perfect the appeal or the appellate court rules for plaintiff, the judgment for possession becomes immediately enforceable.