Awarding Costs in SE Cases

In response to an inquiry about whether costs can be awarded when judgment is on the pleadings:

In analyzing any question related to judgments on the pleadings in small claims court under GS 42-30, it is important to realize that this procedure is unique in small claims law. Default judgments are not allowed in small claims court, and in every case but this the plaintiff is required to present evidence establishing the right to judgment by the greater weight of the evidence. In fact, the summons served on all small claims defendants states, "Whether or not you file an answer, the plaintiff must prove the claim before the magistrate." Only when a landlord seeks to recover possession of rental property is a small claims plaintiff excused from this burden. I think this is significant context, in that the statute is carving out an exception to a well-established rule.

The statutory requirements for a judgment on the pleadings are (1) the defendant has been served, but does file an answer nor appear in court, (2) the complaint indicates that the grounds for summary ejectment are breach of a lease condition for which forfeiture is specified, and (3) the plaintiff asks for judgment on the pleadings in open court. Upon satisfaction of these requirements, the magistrate shall award possession of the rental property to the plaintiff. The statute goes on to say that the plaintiff must provide affirmative evidence in support of a claim for rent or occupancy damages for a magistrate to award money damages in addition to possession. In other words, the exception relieving the plaintiff from the necessity of proving his claim for relief is limited to possession only. Nothing in the statute makes reference to costs, and the statute does not use prohibitory language at all: it does not say "the court may not award money damages unless . . . ." It merely states that a plaintiff is entitled to a judgment for possession upon satisfying the statutory requirements, and then reminds us that the usual rule continues to apply to associated claims for rent or occupancy damages.

Assuming that judgment on the pleadings has been granted, what is the rule for awarding costs of court? The landlord in such a case is clearly the prevailing party and thus presumptively entitled to costs. The answer depends on the nature and extent of the court's jurisdiction over the defendant. When the defendant has been personally served, giving the court full personal jurisdiction over the defendant, costs should be awarded to the landlord as a matter of course. There's no due process reason not to do so, and there's no statutory reason not to do so.

That analysis is dramatically different when the defendant has been served by posting. In that situation, the court does NOT have full personal jurisdiction over the defendant. Its authority is instead limited to affecting the interest of the defendant in real property located within the State – authority characterized by a 1992 Attorney General opinion as being "in the nature of an *in rem* proceeding." In response to a question about whether a court might enter a money judgment in an action for summary ejectment served by posting, Assistant Attorney General David Kirkman wrote, *"[A]n in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through that alternative method [i.e., service by posting under GS 42-30]. The requirements for actual service of process found elsewhere in G.S. § 7A–213 and in G.S. § 1A–1, Rule 4 would still apply to the claim for rents and other money damages."* 60 N.C. Op. Atty. Gen 95.

The next question, then, is whether a different rule should apply to costs than to an award of money damages. I have been unable to find a North Carolina case that definitively resolves this question, but there's far more legal support for treating costs and money damages in the same way than for treating them differently. The underlying rationale for the rule requiring personal service as a prerequisite for entering a money judgment applies with equal force to an award of costs. "An award of costs against a defendant is probably a judgment requiring in part the payment of money." NC Clerk of Superior Court Manual p. 32.1. Many clerks do not automatically docket a judgment for costs only, but the plaintiff may ask that such a judgment be docketed and proceed to enforce it just as any other judgment. Typically, the expense of enforcing such a judgment exceeds the amount that may be recovered, and so this is not a frequent occurrence. The practical effect of docketing the judgment, however, in terms of creating a lien on real property owned by the defendant, does not differ from that of any other money judgment.

I have been able to find only one North Carolina case that specifically addresses the award of costs in an *in rem* proceeding. In Bernhardt v. Brown, 118 N.C. 700 (1896), Justice Clark states that "in proceedings in rem . . . the court already has jurisdiction of the res, as to enforce some lien or a partition of property in its control or the like; and the judgment has no personal force, **not even for costs,** being limited to acting upon the property." Justice Clark's statement is clearly dicta, made in a long-ago case involving service by publication rather than by posting, but I have found no indication that the underlying rationale has changed. Because an award of costs, albeit typically involving a relatively small amount of money, has at least the potential to be docketed and enforced in the same manner as any other money judgment, I believe it should be treated the same, absent a showing of specific legal support for treating it differently. I have been unable to locate such support.
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Update/2020: In the years since I wrote the above, an AOC Workgroup on Summary Ejectment voted to recommend that the SE Judgment Form be amended to add a check box indicating that costs were not awarded in a particular action because, although the landlord was the prevailing party, service was by posting. Because there is a moratorium on amending forms in all but urgent situations, the Civil Forms Committee requested that the issue be addressed through training while the moratorium is in place**. Consequently, the official position endorsed by AOC and recommended by the SOG is that until the form can be amended, magistrates should check neither box relating to the award of costs in this situation.**