CLAIM AND DELIVERY
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CLAIM AND DELIVERY

I. General Provisions

A. Claim and delivery is a prejudgment remedy. It is a procedure for the plaintiff to get immediate possession of the property pending the outcome of a lawsuit (which determines right to permanent possession). The claim and delivery order of seizure only gives the plaintiff the right to possession until the lawsuit is tried.

B. **Plaintiff may not file a claim and delivery affidavit unless the plaintiff also files a lawsuit for recovery of property.** [G.S. § 1-472; *In re Wallace's Estate,* 267 N.C. 204, 147 S.E.2d 922 (1966); *Manix v. Howard*, 82 N.C. 125 (1880).]

1. There is no such thing as a claim and delivery cause of action.

2. Some attorneys use the phrase "claim and delivery" for the action to recover possession of the personal property rather than the ancillary remedy to recover temporary possession until the action to recover possession can be heard.

3. If the plaintiff files a claim and delivery at the same time as he or she issues a summons and files motion for time to file a complaint, the clerk cannot hear the claim and delivery until the complaint has been filed because the clerk must know that the complaint seeks possession of the property.

C. A claim and delivery proceeding may be brought at any time **before** judgment in the principal action. [G.S. § 1-472] It may not be brought after judgment in the principal action.

1. An order of seizure cannot be entered after a default judgment is entered.

2. However, if a claim and delivery proceeding is begun, defendant is served but does not answer within the appropriate time, the plaintiff can get an order of seizure, and then get a default judgment.

D. It is the plaintiff's decision whether to bring a claim and delivery proceeding pending the outcome of the principal action or whether to wait until the decision in the principal action to get possession.

E. A claim and delivery proceeding may be brought in a small claims case to recover possession of personal property. As in other claim and delivery proceedings, the hearing is before the clerk. [G.S. § 7A-231] However, claim and delivery is rarely used in small claims cases because the trial before the magistrate entitling the plaintiff to permanent possession can be heard more quickly than the ancillary claim and delivery proceeding before the clerk.

F. The plaintiff who gets possession by a claim and delivery order of seizure may not then take a voluntary dismissal of the principal action unless the plaintiff returns the property to the defendant. To keep the property, the plaintiff must proceed to judgment in the principal action. [*Manix v. Howard*, 82 N.C. 125 (1880).]

1. If the plaintiff takes a voluntary dismissal,

a) The judge may enter a judgment for restitution, or

b) The defendant may maintain an independent action against plaintiff for damages. [*Powell v. Allen*, 103 N.C. 46, 9 S.E. 138 (1889). But see *Walker Frames, A Division of B.P. Land Development, Inc. v. Shively*, 123 N.C.App. 643, 473 S.E.2d 776 (1996) (may only file independent action).]

2. The plaintiff can get a default judgment and keep the property.

3. It is not the clerk's responsibility to monitor whether plaintiff dismisses the case after the order of seizure is served.

II. Procedure Before Hearing

A. A plaintiff who has filed an action seeking to recover personal property can initiate the claim and delivery proceeding by filing an affidavit for claim and delivery. [G.S. § 1-473]

1. Affidavit may be filed by plaintiff or someone on the plaintiff's behalf, which would include an attorney or agent. [*Spencer v. Bell*, 109 N.C. 39, 13 S.E. 704 (1891) (affidavit by the plaintiff, J.M. Spencer, per D.M. Spencer, was sufficient).]

B. The affidavit must be filed with the clerk in the county in which the principal action is required to be tried. [G.S. § 1-473]

1. If possession is the sole or primary relief sought in the principal action, venue is in county where property is located. [G.S. § 1-76]

2. If the plaintiff seeks money owed and also seeks to recover possession of personal property listed as security for the extension of credit, venue is in any county in which an action on a debt may be filed. [*House Chevrolet Co. v. Cahoon*, 223 N.C. 375, 26 S.E.2d 864 (1943) (action seeking both remedies is not one where the sole or primary relief is possession).]

3. In small claims actions, venue is in the county where one of the defendants resides. [G.S. § 7A-211]

C. The affidavit must show the following:

1. Plaintiff is the owner or is lawfully entitled to possession (e.g., bailee, secured party) of property.

a) One tenant-in-common may not bring action against third party; all joint owners must sue. [*Allen v. McMillan*, 191 N.C. 517, 132 S.E. 276 (1926).]

2. A particular description of the property.

   a) The description is sufficient if it allows the sheriff to distinguish the property listed from other property owned by the defendant. [*March v. Leckie*, 35 N.C. 172 (1851).]

   b) "Ten new buggies" when defendant owned fifteen buggies is not a good description. [*Blakeley v. Patrick*, 67 N.C. 40 (1870).]

3. The property is wrongfully detained by the defendant.

   a) There is no requirement that a demand for the property has been made. [*Heath v. Morgan*, 117 N.C. 504, 23 S.E. 489 (1895).]

4. The alleged cause of the detention.

5. The property has not been taken for tax, assessment for fine or seized under execution or attachment, or if so seized, that it is, by statute, exempt from seizure.

   a) An action may be brought against the sheriff in possession when sheriff wrongully levied on property belonging to plaintiff under an execution against a third party. [*Mica Industries, Inc. v. Penland*, 249 N.C. 602, 107 S.E.2d 120 (1959).]

6. The actual value of the property.

   a) The value set in the affidavit and bond is some evidence of the value but is not conclusive evidence of the value. It is not made as a conclusive declaration of value and, accordingly, defendant is not entitled to take the valuations from the proceeding before the clerk and seek by collateral estoppel to prevent the plaintiff at a trial for a deficiency from proving a different value as the actual value of the property. [*Marine Ecology Systems, Inc. v. Spooners Creek Yacht Harbor, Inc.*, 40 N.C.App. 726, 253 S.E.2d 613 (1979).]

D. The statutory requirements for the affidavit must be strictly followed. [*Hirsh v. J.D. Whitehead & Co*., 65 N.C. 516 (1871).]

E. The affidavit must be sworn to before a clerk or someone authorized to give oaths. [G.S. § 1-473]

F. The form affidavit is AFFIDAVIT AND REQUEST FOR HEARING IN CLAIM AND DELIVERY (AOC-CV-200).

G. To sustain seizure under claim and delivery, the defendant must be in possession of property or have control over it. [*GMAC v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).]

1. The principal action cannot proceed until all parties have been served or a voluntary dismissal is taken against the unserved parties.

2. It is not clear whether the claim and delivery hearing can proceed if the party in possession has been served but the other parties have not yet been served.

   a) Example: Husband and wife purchase a mobile home and sign a security agreement listing it as collateral. Husband and wife separate. Wife is living in mobile home and husband has moved to another state. Wife is served but husband has not been served at the time set for the claim and delivery hearing.

   b) The safer course is not to proceed with the claim and delivery hearing until all of the parties in the principal action have been served because the unserved parties have a right to possession even if they are not in actual possession.

   c) Some clerks may allow the claim and delivery hearing to proceed on the basis that the wife is the only person in possession and the order of seizure is an order allowing the creditor to have possession pending the determination in the principal action.

   d) See *Heath v. Morgan*, 117 N.C. 504, 23 S.E. 489 (1895), in which the court upheld an action to recover collateral from the wife of the debtor without making the husband a party because he was out of state and a fugitive from justice.

3. It is also not clear whether a tenant of the debtor who is living in a mobile home that is the subject of the claim and delivery hearing must be made a party to the proceeding. If the creditor knows that there is a tenant, the safer course is to make the tenant a party for purposes of notice that possession may be terminated. The tenant, of course, would have no liability for the underlying debt. The court has said that the action must be brought against a person who has possession or control of the property sought to be recovered so it could be argued that the owner of the mobile home is the only necessary party because the owner is in control of the property. [*General Motors Acceptance Corp. v. Waugh*, 207 N.C. 717, 178 S.E. 85 (1935).]

III. Hearing [G.S. § 1-474.1]

A. Upon filing of affidavit in claim and delivery, the clerk must set a hearing for determination of the plaintiff's right to claim and delivery.

   1. Because the hearing may not be held less than 10 days from date notice is served, the clerk should set a date sufficient to give time for service.

   2. The clerk or an assistant clerk must hold the hearing.

B. The clerk must issue a notice of the time and date of hearing to defendant.

   1. The form is NOTICE OF HEARING IN CLAIM AND DELIVERY (AOC-CV-201).

2. The notice and a copy of the affidavit must be served on the defendant as provided by G.S. § 1A-1, Rule 4. [G.S. § 1-474.1]

3. The hearing date may not be less than 10 days from the date notice is served.

   a) If defendant is served later than 10 days before the hearing but appears at the hearing, he or she may waive the right to 10 days notice. The clerk may go forward with the hearing.

   b) If the defendant raises an issue of failure to get 10 days notice, the clerk must reschedule the hearing to give the defendant at least 10 days notice. If the defendant appears and does not raise any issue of improper notice, the clerk should make a finding that defendant waived his or her right to 10 days notice by appearing at the hearing and failing to raise the notice issue.

   c) Defendant's appearance at the claim and delivery hearing constitutes a general appearance for purposes of entering a default judgment.

4. Upon request of the plaintiff, the notice may contain an order enjoining defendant from willfully disposing of property, from removing property from N.C. or from willfully damaging the property. The AOC form automatically includes this notice. The remedy for violation of the order is contempt, but the hearing must be held before a judge, not the clerk.

C. Waiver of hearing.

1. Upon request of the plaintiff, the clerk shall mail a waiver of hearing form to defendant. [G.S. § 1-474.1(b)]

   a) The form is VOLUNTARY WAIVER OF HEARING IN CLAIM AND DELIVERY (AOC-CV-901M).

   b) A waiver form may be mailed only **after** the notice of the hearing has been served on the defendant.

   c) The waiver notice must be mailed to the defendant at last known address by first class mail.

2. If the defendant signs and returns a waiver of hearing to the clerk, the clerk, in his or her discretion, may dispense with the hearing and issue an order of seizure after the plaintiff gives bond.

   a) Waiver must be signed by defendant and a witness.

   b) The witness may not be a party to the action or an agent or employee of a party to the action.

D. At the beginning of the hearing if the defendant is unrepresented, it is good practice for the clerk to explain to the defendant the nature of the hearing.

For example, Do you know why you are here? You are being sued for money and possession of a mobile home. You have 30 days from the date the

complaint and summons were served on you to file a written answer in response to that lawsuit. The purpose of this hearing today is to determine whether the plaintiff is entitled to take temporary possession of the mobile home until the judge at the trial determines who is entitled to permanent possession of the mobile home. No matter what the decision is today in the claim and delivery hearing, you must file an answer to the main lawsuit to avoid a default judgment being entered against you. The procedure today is that I will ask the plaintiff to put on his or her evidence and then you will have an opportunity to give me your evidence.

E. At the hearing, the plaintiff must present evidence and the defendant may present evidence.

F. In order to issue an order of seizure, the clerk must find that there is probable cause for the issuance of an order of seizure.

1. The clerk does not try the substantive matters to be determined at the trial on the merits. [*Wachovia Bank & Trust Co. v. Smith*, 24 N.C.App. 133, 210 S.E.2d 212 (1974).] But the clerk must find some basis for ordering the claim and delivery—that there was a contract with a debt; that the property was security for the debt; and that there probably was a default.

2. The clerk should determine the fair market value of property for purposes of determining amount of bond. Clerks usually rely on the plaintiff's statement as to the value of the property unless the defendant contests the value.

G. Possible defenses in a claim and delivery proceeding. Some examples of defenses are:

1. There is no security agreement and therefore no right to possession of the property sold.

2. The property sought is not listed as security (or collateral) for the debt.

a) When a debtor has purchased several items from one seller **at different times** and has signed a consolidated security agreement when each subsequent purchase is made, the seller must apply the payments first to the finance charge and then to first item purchased. When the first item purchased is fully paid, it must be dropped as security for the credit. Then payments go to the second item purchased and so on. This is called the "first in, first out" rule. [See G.S. § 25A-27]

b) **Example.** On October 1 debtor purchases a lamp for $150 and signs a security agreement from Kimbrell's paying $50 down. Debtor signs a security agreement listing the lamp as collateral and agrees to pay $50 per month. Debtor makes two payments and then on December 8 he goes to Kimbrell's and buys a living room couch for $800. He signs a security

agreement listing the lamp and the couch as collateral and continuing the payments at $50 per month. Two months later he buys a television for $500 and signs a security agreement listing all three items as collateral. Assume that the monthly interest is $15. When debtor makes a $50 payment, $15 is applied toward the interest and $35 is applied toward the lamp. When the debtor has made five payments, $175 would have been applied to the purchases. The lamp would be fully paid for and is no longer security for the debt; $25 would be applied to the couch, which was second item purchased.

3. The property sought is household belongings and the creditor is not a purchase money secured party. Under G.S. § 1C-1601(e)(7), a debtor may claim exemptions in household goods if the goods are listed as security in a nonpurchase money security agreement. In that situation the clerk might determine that it is not probable that the plaintiff will be entitled to permanent possession because an execution could not be issued without giving defendant a notice of rights and the opportunity to exempt the household goods listed as security.

H. At the end of the hearing, the clerk enters findings and an order either authorizing the issuance of an order of seizure or not ordering the issuance of the order. The form is FINDING ON APPLICATION FOR CLAIM AND DELIVERY ORDER (AOC-CV-202).

1. Some clerks use this form so that there is a record in the file of the hearing.

2. Some clerks do not sign the form since it is not required by statute but directly issue the order of seizure if the clerk determines that it should be issued.

I. The clerk also signs the order of seizure, which is ORDER OF SEIZURE IN CLAIM AND DELIVERY (AOC-CV-203).

J. Expiration of the order. The clerk must determine if the claim and delivery is based on a default in a security agreement. If so, the order expires if it is not served within 60 days after issuance, and the clerk must indicate on the order that it expires. [G.S. § 1-474(b)] (AOC-CV-203 includes a block to be checked when the order falls within this category.) If the order is one that expires and it has not been served within 60 days, the safer practice is for a clerk to hold a new hearing before issuing a second claim and delivery order of seizure. If the claim and delivery order is not based on a default in a security agreement, it has no expiration date and can be served any time until judgment is entered in the principal action. If, when judgment is entered, the claim and delivery order has not been served, the clerk should recall the order.

K. Clerk's action in ordering or disallowing order of seizure is judicial act. The clerk's act in issuing or refusing an order of seizure under a claim and

delivery is a judicial act and may be appealed under G.S. § 1-301.1 to a judge of the court having jurisdiction of the main action. [G.S. § 1-474]

1. Appeal by a defendant from an order of seizure by the clerk does not stay execution of the order. [G.S. § 1-301.1]

2. A judge of the court to which the appeal lies or the clerk may issue a stay upon the posting of an appropriate bond. The person issuing the stay should set the bond. The clerk might logically determine that an appropriate bond would be one similar to the bond under G.S. § 1-478.

IV. Plaintiff's Bond

A. If the clerk issues an order of seizure, the plaintiff must give a bond for double the value of the property to be recovered. [G.S. § 1-475]

B. The bond may be executed by one or more sureties.

1. The sheriff must approve the sureties because the sheriff is liable for them until the property is turned over to the plaintiff. The clerk may either have the sheriff take the bond or may have the surety fill out the bond and then send it to sheriff for approval of sureties.

2. The clerk can sign the order of seizure without the bond, but the sheriff cannot serve the order until the plaintiff has given a bond approved by the sheriff.

3. See section VIII at page 35.11 regarding when the bond is released.

C. The bond is payable to defendant and covers the return of the property to the defendant with any damages for deterioration or loss of use or, if the property is not returned, for the value of the property at the time of seizure with interest.

1. The surety under a claim and delivery bond is an insurer and liable for return of property even if it is destroyed by act of God. [*T & H Motor Co. v. Sands*, 186 N.C. 732, 120 S.E. 459 (1923) (party holding property liable when car destroyed by fire).]

D. The sheriff or clerk should require the sureties to sign the bond, but should not make the sureties justify when they give bond. Justification is requiring the sureties under oath to swear that they are worth the amount of the bond. Under the statute, justification is a separate procedure required only upon the objection of the defendant. [G.S. § 1-477] See section VI.C.5 at page 35.10 for a discussion of justification.

V. Procedure By Sheriff

A. The sheriff must take the property listed in the order of seizure. [G.S. § 1-476]

1. The sheriff may take the property from the defendant's possession or from the possession of defendant's agent.

2. If the sheriff knows that the property is concealed in a building or enclosure, the sheriff must demand entry and break into the building or enclosure in which property kept. [G.S. § 1-480]

3. The sheriff may seize a mobile home pursuant to a security agreement even if the wheels are off the mobile home and a porch has been built on to it. Generally, the security agreement provides that as between the creditor and debtor the mobile home will remain personal property. [*Lee-Moore Oil Co. v. Cleary*, 295 N.C. 417, 245 S.E.2d 720 (1978).] G.S. § 25-9-604 provides that if the secured party has priority over all owners and encumbrances of the real property, the secured party, after default, may remove the collateral from the real property. The sheriff (creditor) is not responsible for paying for any damage or cost of repair if the debtor owns the real property. If a third party owns the real property, the sheriff (creditor) is responsible for paying for any damage to the real property, but not to the debtor's property.

B. The sheriff must serve a copy of the affidavit, bond and order of seizure on the defendant personally, or if the defendant cannot be found on the defendant's agent from whose possession the property is taken or, if neither can be found, by leaving them at usual place of abode of the defendant or defendant's agent with a person of suitable age and discretion. [G.S. § 1-476]

C. No specific time limit is specified for the sheriff to carry out the order. The statute requires the sheriff to act "forthwith." [G.S. § 1-476]

D. The sheriff must hold the property for 3 days after a copy of the order is delivered to the defendant. [G.S. § 1-477]

E. If the defendant has not put up a bond within 3 days, the sheriff turns the property over to the plaintiff.

F. Within ten days after seizing the property, the sheriff must make a return to the clerk. [G.S. § 1-484]

VI. Defendant's Options Upon Seizure of Property

A. **Defendant may either object to plaintiff's surety or give a written bond, but not both**.

B. Defendant may object to surety on plaintiff's bond. [G.S. § 1-477]

1. Objection must be made within 3 days after service of the affidavit, bond and order on defendant.

2. The defendant must notify the sheriff personally or leave a copy in his office in the county seat stating that the defendant excepts to the sureties.

3. Defendant's failure to object within 3 days constitutes a waiver of the objection to the sureties.

4. Upon objection, the plaintiff's sureties must justify. Justification must follow the procedure set out in arrest and bail.

a) The sheriff must notify the clerk of the objection. If the sheriff fails to have the surety justify, the sheriff becomes liable as a surety. [*Wells v. Bourne*, 113 N.C. 82, 18 S.E. 106 (1893).]

b) The clerk sets the time for sureties to appear and justify.

(1) The hearing must be set not less than 5 or more than 10 days from issuance of notice of hearing. [G.S. § 1-422]

c) Defendant gives plaintiff or plaintiff's attorney notice of the time and place for justification.

d) The clerk takes the justification by examining each surety under oath to determine that he or she (1) is a freeholder and resident of North Carolina and (2) is worth the amount of bond exclusive of property exempt from execution. [G.S. §§ 1-423, -424]

(1) The surety is entitled to claim G.S. Ch. 1C exemptions.

(2) If there is more than one surety, the clerk may allow individual sureties to justify in an amount less than the total bond, if the whole justification is equivalent to that of one sufficient bond. [G.S. § 1-423]

e) The justification is found on ORDER OF SEIZURE IN CLAIM AND DELIVERY (AOC-CV-203).

f) The clerk's finding that each surety is sufficient must be made in writing on the bond, if requested by the defendant. [G.S. § 1-424]

g) If the clerk fails to find a surety is sufficient, the plaintiff must execute new bond, with a new surety.

C. Defendant may give a bond to allow defendant to keep property until a determination is made at trial. [G.S. § 1-478]

1. The bond must be given before the property is turned over to the plaintiff.

2. The defendant gives the bond given to the sheriff.

3. The bond is given by one or more sureties for double the value of the property and is payable to plaintiff for delivery of property to plaintiff if he prevails and for damages for detention, loss of value and costs, or if property is not returned, for value of property at time of taking plus interest and costs.

4. The form is DEFENDANT'S BOND IN CLAIM AND DELIVERY (AOC-CV-900M).

5. Defendant's surety must justify before the court.

a) Defendant must give the plaintiff not less than 2 nor more than 6 days notice of justification.

b) Justification for defendant's surety is same as set out in Section IV.D at page 35.8 for plaintiff's surety.

6. After defendant's surety has justified, the sheriff delivers the property to the defendant.

VII. Property Claimed By Intervening Third Party [G.S. § 1-482]

A. A third party who claims that the property belongs to him or her may file with the sheriff an affidavit of his or her right to possession of the property.

B. Also the third party intervenor must file with the sheriff a bond of double the value of the property.

1. The bond is for delivery of the property to the party entitled to it and for costs and damages awarded and payable to plaintiff and defendant.

2. The bond must be executed by one or more sureties who sign an affidavit that they are each worth double the value of the property

3. A third party may intervene without giving a bond if the third party does not ask for possession of the property pending trial. (In that case the third party intervenor is protecting his or her right to participate in the main action to show ownership.)

C. The sheriff serves a copy of the third party's affidavit and bond on the plaintiff and defendant.

1. It must be served at least 10 days before the return day on the summons (time for filing an answer) in the principal action.

D. A determination of who is rightfully entitled to the property is decided in the principal action.

E. When the third party files a bond, the sheriff delivers the property to the third party unless the plaintiff executes another bond similar to that made by third party. [G.S. § 1-483]

1. Plaintiff's bond should be same as the original bond except that it should promise to return the property to the third party intervenor with payment of any damages.

VIII. Actions Against Sureties

A. The sureties are released when the party holding the property is awarded the property in the principal action.

B. When party signing a bond loses in principal action.

1. Judge can set amount of damages against bond and sureties in the principal action. [*Hendley v. McIntrye*, 132 N.C. 276, 43 S.E. 824 (1903).]

2. Party seeking damages from bond may bring independent action on the bond. [*Federal Finance & Credit Co. v. Teeter*, 196 N.C. 232, 145 S.E. 8 (1928).]