Lecture Notes/Module 2: Special Procedural Rules for SE Cases

GS Ch. 42 governs summary ejectment actions and landlord-tenant law in NC. As we've said, a great deal of that chapter consists of old statutes, some of little relevance today. If you were to look only at the parts of Ch. 42 that have been added over the last 50 years, though, you might notice something: virtually every addition is either clearly beneficial to landlords, or clearly beneficial to tenants. There are few neutral statutes. If you look only at one type or the other, you might be tempted to view landlord-tenant law as biased in favor of one side or the other. If you take a closer look, you'll notice another pattern: Every "new" statute beneficial to tenants might be characterized as consumer protection law, while the statutes beneficial to landlords are procedural changes directed at making SE cheaper, simpler, and most of all, faster. Time is money for landlords, and they lose money every day a non-paying tenant occupies rental property that could otherwise be occupied by a paying tenant. As we shall see, it's not altogether clear that many of the consumer protection statutes applicable to tenants are actually effective, but it's quite clear – despite LLs frequent protestations to the contrary – that the special procedural rules making SE faster are widely observed. In fact, if the typical civil lawsuit is molasses, a SE lawsuit is water!

Intro to procedural law: If you ask a lawyer where the law of procedure may be found in the statutes, s/he won't miss a beat before saying GS Ch. 1A. Every law student spends a year studying the Rules of Civil Procedure which, according to GS 1A-1, Rule 1, "govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute*." Lawyers who are unfamiliar with small claims court are often confused, because GS Ch. 42, Art. 19 establishes a "differing procedure" for many aspects of small claims cases. Many attorneys are not aware of this, and understandably so. But even people who familiarize themselves with Art. 19 may be bewildered by procedural aspects of a summary ejectment action, because GS Ch. 42, governing summary ejectment actions, contains several exceptions to Art. 19, which are themselves exceptions to GS Ch. 1A! The special procedural rules applicable to summary ejectment are so numerous and significant that we cover them separately from the Intro 1 sessions on general small claims procedure. That's what we're going to talk about now.

Chronologically Speaking

A landlord's first encounter with our customized treatment of summary ejectment cases occurs when s/he requests a complaint form from the clerk, because those cases have their **very own complaint form**, AOC-CVM-201.

As a general rule, in small claims courts as in other trial courts, litigants may choose to represent themselves or be represented by an attorney. As you'll remember from Intro I, there are two exceptions to this rule. First, corporations and similar business entities are allowed to have an agent sign the complaint and represent them in court, because these companies, as fictional "persons," necessarily always act through an agent.

The second exception is unique to summary ejectment cases. An **agent with personal knowledge** of the allegations set out in the complaint **may sign the complaint** on behalf of the plaintiff/property owner.

GS 7A-216 and -223(a). In fact, the SE complaint form has a section at the bottom specifically for this purpose. NOTE, however, that GS 1A-1, Rule 17, still applies to this situation: while an agent may sign the complaint and appear in court on behalf of the landlord, the plaintiff (i.e**.,** ***real party in interest***) in SE cases is the person actually entitled to possession of the property. That person is the owner, unless the SE action involves a sublease, in which case the proper plaintiff is the tenant – who is, of course, landlord to the subtenant.

After the complaint is filled out, it is filed with the clerk, who immediately sets the **trial date** ***within 7 business days***. GS 42-28. (Compare 30 days for all other small claims cases.) A summons is issued immediately and, along with the complaint, is transmitted to the sheriff to be served.

The sheriff is required to **serve the summons within 5 days** of receipt (no time limit for other small claims cases), but **at least 2 days prior** to trial (compare 5 days for other small claims cases). GS 42-29.

Immediately upon receipt, or as soon as practicable, the sheriff is directed to **mail these documents** to the tenant by first class mail. When the deputy visits the rental premises to attempt to personally serve the defendant, the sheriff may "post" the documents on the premises if no one answers the door. (**Service by posting** is not a permissible means of service in other small claims cases.) GS 7A-217(4), 42-29.

Because service by posting is less protective of due process than personal service, a magistrate is authorized to award possession of the rental premises, but not a money judgment (including costs of court) to a landlord in these circumstances. Remember that voluntary appearance by a defendant is always legally equivalent to full personal service, and thus a tenant's appearance at trial, equivalent to full service, removes the limitation present when service was by posting.

As we've said, when service is by posting and the tenant does not appear at trial, the landlord may be awarded possession, but the magistrate is not allowed to consider the landlord's claim for back rent or other money damages. The law allows a landlord to file a later lawsuit for money damages (which will be personally served, since service by posting is not available in any cases other than SE). The ability to file a second case, however, was unsatisfactory to many landlords: two cases = 2 court costs. In 2017, the law was changed to implement **a procedure for *severing* the two claims**: In a case in which the landlord files a complaint seeking SE and $ damages, served by posting, and the tenant does not appear at trial, the landlord has the option of requesting that the claim for possession be heard immediately (as usual), but that the claim for money damages be *severed*. Severance of the claims permits the landlord to pursue personal service of the remaining claim for money at leisure, giving the sheriff time to make multiple trips to the tenant's home or job. When personal service is eventually accomplished, Part 2 of the original SE lawsuit is tried. Because this second trial has the same case number as the first, there is no need for the landlord to file a second lawsuit and pay the associated court costs. GS 7A-223(b1).

So far, we've talked about procedures that happen prior to trial. One procedural rule that may come up prior to trial or during trial concerns **continuances**. In SE cases only, a magistrate may grant a continuance only for good cause shown and for a maximum of 5 days or the next session of court (unless both parties consent to a longer period). GS 7A-223(b).

Now we're at trial. You may remember that one of the Mandatory Rules we learned in Intro 1 is that there are no default judgments in small claims court: a plaintiff is required to prove the essential

elements of the claim by the greater weight of the evidence regardless of whether the defendant is present or not. No exceptions . . . . except there is one exception, available only in SE cases, called ***judgment on the pleadings*****.** GS 42-30 excuses landlords from the requirement of proving a claim for SE if (1) the tenant has been served, (2) but is not present in court, (3) and the complaint form states the grounds for eviction are breach of a lease condition (Box #3), and (4) the plaintiff requests judgment on the pleadings in open court.

You've heard the evidence (assuming it's not a JOTP case) but are not quite ready to make your decision. You remember from Intro 1 that you have an alternative to immediately announcing your judgment in open court – you **can *reserve* judgment** for up to ten days. Unless it's a SE case. GS 7A-222 restricts a magistrate's ability to reserve judgment in two ways: first, the only permissible reason for reserving judgment is that a particular case is "more complex," and the magistrate must make a specific finding to that effect. (Note that a typical reason for reserving judgment, that of avoiding potential violence between obviously volatile litigants when the decision is announced, might or might not be found to be "more complex," under this statute.) The second restriction is a reduction of the time allowed before the judgment must be entered: 5 business days, rather than the usual 10 days.

The special procedural rules for SE cases don't stop when you enter judgment. If you enter judgment in favor of the landlord, additional provisions apply to an appeal by a tenant and also to enforcement of your judgment for possession.

A magistrate should **always inform small claims litigants that they have a right to appeal** the decision and have a whole new trial in district court. It's important to do this because appeal for trial de novo is an integral aspect of our small claims proceedings. Remember that a plaintiff has the right to decide that a case will be brought in small claims court, rather than in district court, regardless of what the defendant prefers. Many small claims magistrates have no formal legal education, and the small claims forum is deliberately structured to be simpler and faster than a district court case. Small claims cases that are appealed quite often have a different outcome, for many reasons, and that in no way reflects adversely on the small claims trial. But that opportunity for a different outcome is a vitally important part of the process, and the integrity of the whole system breaks down if litigants are not made aware of it.

So, whether at the beginning of the court day or individually for each case, the magistrate must inform litigants that they have a right to appeal the decision and instruct them on how to do so: by giving notice of appeal in open court, or by filing notice of appeal with the clerk within ten days. Note that all small claims judgment forms have a place for you to record the tenant's notice of appeal given in open court.

In addition to noting a tenant's appeal when given in open court, a magistrate must be certain to inform them that their appeal is not finalized until they visit the clerk's office to pay costs of appeal. (Note that an indigent tenant is not required to pay court costs, although the tenant must still see the clerk to arrange their appeal.) In fact, an appeal is automatically dismissed if costs of appeal are not paid in a timely manner. Most small claims litigants have 20 days to pay costs, but a **different rule applies for SE cases: costs must be paid within 10 days.** Obviously, this is potentially confusing, particularly if litigants have been present in the courtroom when judgment was entered for non-SE litigants, so be certain to clearly provide this information.

The most frequent question tenants ask when judgment is for the landlord is "When do I have to leave?" The correct answer to this question is that the tenant has ten days in which to decide whether to appeal, and that after that ten-day period, the landlord has the right to proceed with the eviction.

Practice note: My opinion is that you should not make statements such as "you should leave right away unless you work something out with the landlord." Such statements by a judicial official suggest that post-judgment negotiations are part of the formal legal proceeding, and that is misleading and often causes confusion.

The law allowing a tenant to "**post a rent bond**" is difficult to state simply, because the requirements differ to some degree from one litigant to the next. I suggest that magistrates refer tenants to the clerk's office for information about what will be required for the tenant to remain on the property while an appeal is pending or, if the clerk is not agreeable to providing such information, provide the tenant with a statement of the law. In any event, a magistrate should be extremely careful not to provide inaccurate information. Two common examples include:

1. Telling a tenant that an appeal is allowed only if the tenant posts a rent bond. In fact, ejectment of a tenant has no effect on that tenant's appeal.
2. Telling a tenant that the stay procedure (or worse yet, an appeal) requires the tenant to deposit all rent in arrears with the clerk. In fact, it is the amount of undisputed rent in arrears that must be deposited, and that requirement is waived for indigent tenants.