My Last Post on the CDC Eviction Moratorium, Almost for Certain

Readers are probably aware that the CDC Eviction Moratorium has been extended until July 31, accompanied for the first time by a statement that it is unlikely to be further extended. However, the Governor's Executive Order 171 was not extended and so expired on June 30. I've received many questions from judicial officials and other occupants of Landlord-Tenant Land about what the law of summary ejectment looks like for July. For a summary of both the CDC Order and EO 171, I encourage you to read my prior blog post, in which I discuss both orders separately. That post should be helpful in making clear what law continues to apply (i.e., the CDC Order) and what law is no longer in effect (i.e., EO 171). In this memo, I'm offering a few specific observations in response to the most frequent questions I've been getting.

Question: Has summary ejectment law finally returned to what we're all used to?

Answer: Not yet. The CDC Order continues in effect until July 31. Challenges to the constitutionality of the Order have been filed in a number of federal court actions, with varying results, but none of those rulings have any direct immediate impact on NC courts. In addition, the U.S. Supreme Court recently refused to hear a case raising the issue, dashing the hopes of some for an authoritative ruling prior to the end of this month.

Question: What's different now that the CDC Order stands alone, without the supporting structure of the Governor's Order?

Answer: From my point of view, the most significant feature of EO 171 was its answer to numerous questions about the procedure to be followed in integrating the protections of the CDC Order into summary ejectment proceedings. The expiration of that Order means:

- Landlords are not required to provide a blank copy of a Declaration to a tenant, provide an affidavit stating that they've done so, or notify the court of receipt of a completed Declaration.
- Receipt of a Declaration by a landlord no longer mandates a pause in the small claims or district court proceeding.
- Landlords wishing to challenge the validity of a Declaration are no longer required to do so in a written Response.
- There is no longer a provision allowing a landlord to obtain a post-judgment hearing on whether the tenant falls within the protection of the CDC Order merely by filing a Response.

Question: What, then, is the correct procedure for summary ejectment cases heard in small claims court?

Answer: Well, that's the $64,000 question! The knee-jerk answer is that "the usual procedure applies," and that's technically correct and also appealing in its simplicity. It's not very helpful in practice, though. The "usual procedure" in civil court applies to claims asserted by plaintiffs and defenses raised by defendants. The CDC Order's provisions, presented as a mandate enforceable by criminal law, don't fit neatly into that basic model. The CDC Order does not directly address any aspect of how its provisions are intended to affect civil court proceedings. I discussed this at some length in my previous blog post, and I strongly encourage you to read that discussion, located in the first few pages of post. Despite the lack of clarity about details, there seems to be general consensus that the Order has some significance in eviction proceedings, leaving judicial officials presiding over those proceedings to determine how best to implement its provisions.

Now for the Hard Questions: Which party has the burden of addressing the potential application of the CDC Order? Is it the landlord, as part of establishing that they are legally entitled to the remedy they seek? Or is it a defense that, just as other defenses, must be raised by the tenant? And if neither party addresses the issue, may/should the court ask whether the tenant has provided the landlord with a Declaration?

Considerations: The underlying question here is which party is legally responsible for addressing the issue whether a judgment for possession by a state court might involve a violation of federal law. Generally speaking, this sort of concern does not "belong" to either party, but rather to the court itself -- which is perhaps why it feels like such a difficult question. It is made even more difficult by the confusion about exactly what constitutes a violation of the CDC Order (again, discussed at length in my previous blog post). This is different from the typical question that comes up when a defendant files for bankruptcy, triggering the automatic stay provision. In that case, the plaintiff violates the law by taking any further action, putting the court into the position of itself violating the law by proceeding. In contrast, it is NOT clear that a plaintiff—who apparently does not violate the order merely by filing a summary ejectment action – is involving the court itself in illegal activity by proceeding with the case.

Assuming for the sake of argument that only actual physical removal of the tenant from the rental property violates the Order, the question then becomes whether a civil court should pause the proceeding out of concern for a potential violation of the Order. This concern is not unfounded: as a practical matter, any judgment for possession is likely to be enforceable. The authority of clerks to refuse to issue writs of possession or of sheriffs to refuse to execute such writs is questionable at best, and the ability of these officials to determine whether the CDC Order applies in any particular case altogether lacking.

One Possible Answer: While EO 171 is no longer in force, NC courts may want to consider continuing to follow its underlying principles, if only for the sake of consistency. After all, the procedural questions raised by the CDC Order did not vanish when the Governor's Order expired, and courts are unavoidably required to make procedural decisions in its absence. The principles upon which EO 171 was based appear to have been the following: First, the tenant should be

aware of the protections offered by the CDC Order. Second, the court should have information about whether the tenant has invoked those protections by delivering to the landlord a Declaration. These two principles effectively establish a procedure which avoids placing on either party the burden of the potential applicability of the Order on either party, but instead identifies this question as a matter of independent concern for the court system. This approach seems to be consistent with the idea that judicial officials are appropriately reluctant to provide a forum for individuals to behave in a way that violates the law. Once the court has determined whether the CDC Order applies, the case would proceed as usual if no Declaration has been filed. If a Declaration has been filed, however, the burden would shift to the landlord to address the question whether enforcement of a judgment for possession would violate the Order. If not – either because no valid Declaration has been filed, or because the eviction is based on permissible grounds – the action would proceed as usual. If so, the court would not proceed until enforcement of the judgment would no longer violate federal law. Note, however, that this is only one possible alternative. Ultimately, judicial officials will determine the manner in which the potential applicability of the CDC Order will be addressed in the cases coming before them.

Question: What, if anything, should judicial officials do differently in their judgments while the CDC Order is in force?

Answer: Landlords who violate the CDC Order face potential state and federal liability for unfair trade practices as well as violation of the Order itself. In many cases, the question whether the landlord violated the Order will turn upon the grounds for eviction in the particular case. For this reason, magistrates entering judgment for the plaintiff in summary ejectment actions should include a specific finding as to the grounds for eviction. Similarly, if a tenant has filed a Declaration and the court has proceeded based on a determination that the Declaration is invalid, that finding too should be noted in the judgment. This specificity is present in all judgments entered by district court judges, which must contain findings of fact and conclusions of law -- but the grounds for eviction are not required to be specified on the CVM-401 Judgment Form. This makes sense as a general rule, because the particular grounds for eviction ordinarily have no post-judgment legal significance. They may well be extremely significant, however, in the months to come.

One final note: Summary ejectment actions are never easy, and small claims magistrates have now spent more than a year in encounters with increasingly desperate parties on both sides of the cases they hear. One bright note, which I encourage you to share, is the availability of relief through the HOPE program. My understanding is that the program can pay for up to 9 months of arrears and up to 3 months of forward rent – directly to the landlord -- within 14 days of application. The website is www.HOPE.NC.gov, and the telephone number is **888-9ASK-HOPE.**