New Legislation regarding Summary Ejectment

Landlords often encounter a frustrating situation when they file a lawsuit for eviction and past due rent, resulting, ironically, from the interaction of two laws intended to benefit landlords. First, GS 42-29 requires the sheriff to expedite service of process by mailing the tenant the complaints and summons "as soon as practicable." Within the next five days, and at least two days before the trial, the officer must visit the tenant's home to attempt personal service. If no one answers the door when the officer knocks, the second special rule for summary ejectment cases kicks in, allowing the officer to simply post the summons and complaint on the door. Such "service by posting" allows the trial to go forward even though the tenant has not been personally served.

In all other small claims lawsuits, a defendant must be served in a way more likely to provide actual notice of the trial. Usually the officer either hands the paperwork to the defendant or leaves it with someone living there. Sometimes service is accomplished by certified mail or delivery service requiring a signature. Obviously, tacking notice of a lawsuit to the tenant's door is a less certain way of notifying the defendant of the trial, and a landlord in that situation may recover at most possession of the rental property – a money judgment is not allowed. The rationale is that service by posting is likely to provide adequate notice to a tenant living on the property, who will probably see the posted material, and that a tenant no longer living on the property is probably less concerned about being evicted anyway. This reasoning obviously doesn't apply to judgments requiring defendants to pay money. A tenant who has moved away is not likely to see a notice that she or he is being sued for money, and so service by posting is legally insufficient notice, in terms of due process, to allow a judgment for back rent or other money damages.

The combined result of these laws is that many summary ejectment cases are served by posting simply because there isn't time for the sheriff to make a second trip to the tenant's home to try again for personal service. This works well for landlords who just want their property back. Landlords asking for both possession and back rent, however, are faced with a choice: they may withdraw their claim for money damages and go ahead with their claim for eviction (filing a second lawsuit later for money), or they may ask that the case be continued in order to pursue personal service on the tenant.

The 2017 General Assembly addressed this problem in 2017-S.L. 143. Effective October 1, 2017, the new law amends GS 7A-223 as follows:

In any small claim action demanding summary ejectment and monetary damages, and where service of process has been achieved solely by first-class mail and affixing the summons and complaint to the premises pursuant to G.S. 42-29, the plaintiff, or an agent pursuant to subsection (a) of this section, may request that the claim for summary ejectment be severed from the claim for monetary damages. Upon a finding that personal service was not achieved for one or more defendants, the magistrate shall sever the claim for monetary damages and proceed with the claim

for summary ejectment. If the magistrate severs the claim for monetary damages, the plaintiff may extend the action in accordance with G.S. 1A-1, Rule 4(d). The judgment of the magistrate in the severed claim for summary ejectment shall not prejudice the claims or defenses of any party in the severed claim for monetary damages.

The new law makes two additional changes: It amends Rule 4 (h1) to specify that the second summons—in which money damages is the only claim left to be determined—may be served by a private process server. And it amends GS 7A-222 and 7A-228 to provide that parties in small claims actions, and in appeals from those actions to district court, "shall not be required to obtain legal representation."

At first glance, the effect of this new legislation seems modest. Landlords have long had the right to file separate lawsuits for possession and money damages. GS 42-28. Thus the effect of the new law is not to permit a recovery of money damages where such recovery was not previously available. Regardless of whether those claims are determined in one lawsuit involving severed claims or two separate lawsuits, a landlord is faced with the inconvenience and expense of serving two summons and making two court appearances. The primary impact of the new law on landlords is the savings of the $96 costs of court fee associated with filing a second lawsuit. (Because costs are taxed to the tenant when the landlord wins a money judgment, this savings will benefit tenants as well.)

The immediate challenges for the court system posed by this legislation are administrative and procedural. While "partial" judgments are common in the other trial courts, the practice is new to Small Claims Land. The AOC form judgments used by small claims magistrates do not contemplate partial disposition of an action and will likely require revision. There will probably be case management issues as well, arising, for example, when a landlord delays or never gets around to following up on the still-pending claim for back rent.

Most of the questions that immediately occur to me relate to the procedures for appeal. It seems apparent that the legislature intended a magistrate's judgment for possession to be enforceable even though a claim for money damages is pending and the case has not yet been finally and completely decided. Can a tenant immediately appeal from the judgment for possession? If an immediate appeal is available, do the usual rules governing appeal – including the procedure for staying enforcement while appeal is pending – apply? If the tenant does appeal, may be the pending claim for back rent be considered by the small claims magistrate—or does the appeal to district court deprive the small claims court of jurisdiction? Should the district court in the de novo appeal treat the claim for rent as part of that case, even if this claim has never been addressed by the small claims magistrate? If the tenant does not immediately appeal from a judgment for possession, does the tenant have the right to challenge that judgment on a later appeal from the final judgment concerning back rent? Does it matter whether the tenant does or does not prevail in the trial determining the claim for money damages? In other words, is the tenant an "aggrieved party" for purposes of appeal if the tenant lost at the first hearing, for possession, but won at the

second hearing, for money damages? There are a number of other questions, related to appeal as well as to other aspects of this bifurcated trial that will have to be resolved before this new legal procedure will be smoothly integrated into existing practice. For now, more questions than answers, but stay tuned . . .