Summary Ejectment in the time of COVID, Part 2: The CDC Order and EO 171

Over the last several months, both federal and state governments have issued orders, effective until December 31, placing temporary restrictions on residential evictions. As everyone knows, many tenants have lost their jobs and thus their ability to pay the rent when it's due. At a time when *Stay Home!* signs are everywhere, billboards are a common sight, the prospect of large numbers of tenants either moving in with relatives or friends or becoming homeless raises serious public health concerns. The result has been a hodgepodge of emergency measures enacted by local, state, and federal governments. The interpretation and implementation of these measures has, not surprisingly, been challenging for the court system.

In this blog post, I will focus on (1) the CDC documents, consisting of the original CDC order and a "non-binding guidance document" for that Order issued by the agency several weeks later, and (2) Governor Cooper's Executive Order EO 171 and accompanying FAQ document, effective October 30. These four documents comprise "The Law" governing residential evictions in our state today. Their provisions are extremely important for judicial officials to understand -- although these writings are neither entirely consistent nor clear. More significantly, none of them purport to be comprehensive. The result is an abundance of legal issues related to their practical implementation for which there are simply no clear answers. A thorough analysis of these issues would produce a document closer to a book than a blog post. What follows is an effort to summarize the most significant provisions of these documents, identify some key legal issues presently confronting judicial officials, and share my own thoughts about those issues.

The CDC Order

The CDC Order prohibits landlords from evicting residential tenants for reasons related to the payment of rent if they have received a *Declaration* from the tenants. A valid Declaration is a document executed by the tenant under penalty of perjury attesting to five statements, most of which relate to the tenant's ability and efforts to pay rent. A landlord who evicts a tenant for reasons related to rent after having received a Declaration has, nothing else appearing, violated the law and is subject to significant criminal penalties, including fines and imprisonment.

Judicial officials faced with eviction cases based on default in the rent confront many questions about how to implement the Order. Because the Order creates a criminal offense applicable to landlords without mentioning courts or civil procedure, it does not address the most fundamental question asked by those officials: What does this mean for us? In other words, what – if any -- procedures should be used to implement the protections of the Order? What – if any – civil consequences should be imposed by the courts in response to a landlord who violates the Order? An extreme reading of the Order might be that it has no implications at all for judicial officials hearing summary ejectment actions, but instead is to be enforced only through the criminal process

identified in the Order. Subsequently issued orders have largely eliminated that interpretation – it seems clear that a violation has some relevance in an eviction action -– but the above questions continue to have uncertain answers.

When the CDC Order was first announced, two questions immediately became the focus of intense advocacy, and those questions continue to challenge judicial officials hearing eviction cases. The first question was whether and how a landlord might challenge the assertions made by a tenant in a Declaration. The second is a two-part question: (1) what behavior by a landlord constitutes a violation of the CDC order, and (2) what is the role of judicial officials in summary ejectment actions (1) in preventing a violation, and (2) in responding to a violation?

Challenging a Declaration

The CDC Order makes no provision for a landlord to challenge a Declaration. Instead, the Order extends protection from eviction to "covered persons," defined as a tenant who provides the landlord with a Declaration attesting to the required assertions under penalty of perjury. That language appears to be unambiguous, and this interpretation of the rule would certainly accomplish the objective of dramatically limiting the number of evictions during the moratorium. Advocates for landlords vigorously objected, however, pointing to the inevitable abuse by some tenants providing false affidavits. Advocates for tenants asserted that the CDC Order anticipated and addressed this concern by requiring the Declaration to be executed under penalty of perjury.

You might notice a certain parallel between this issue and the one discussed above related to landlords who violate the Order. In both situations, the CDC Order itself relies on criminal sanctions to elicit compliance with its provisions, and in both situations advocates as well as others voice considerable skepticism about the effectiveness of relying solely on those enforcement mechanisms.

What Behavior by a Landlord Violates the Order?

The second focus of inquiry about the CDC Order was identifying the precise behavior prohibited by the Order. As I've said, the CDC Order makes no reference at all to the role of the civil court in responding to it. In formulating a response, judicial officials needed to know whether a violation of the law had even occurred in the cases pending before them. Absent a violation, it seemed unlikely that a civil court had authority – or reason -- to do anything other than the usual in hearing eviction cases.

The CDC Order itself states that a landlord violates the Order by *evicting* a covered person for a default related to payment of rent. *Eviction* is defined in the Order as "any action by a landlord, owner of a residential property, or other person with a legal right to pursue eviction or a possessory action, to remove or cause the removal of a covered person from a residential property." In North Carolina, where self-help eviction in the residential context is prohibited, there are several

sequenced steps a landlord must take to oust a tenant, ranging from filing a complaint to requesting a writ of possession. At what point in the sequence may a landlord be said to have taken “any action . . . to remove or cause the removal” of the tenant? Judicial interpretation is required for this determination. If the court determines that a violation has in fact occurred, the next question to be resolved is, as I have said, “So what?”

The “Non-binding Guidance Document”

The questions North Carolina judicial officials were struggling with were problematic in courts across the country. Approximately one month after the CDC Order became effective, that agency, joined by HUD, the Department of Justice, and the Department of Health and Human Services, “shared their views” in a “non-binding guidance document” about these and other questions related to the CDC Order.

Before we look at the content of the Guidance Document, a word about the legal status of the document itself. Some advocates have argued that it is binding on court officials and thus determinative of the issues discussed above. I disagree with this contention, for the following reasons: Most obviously, the document itself makes clear in the introductory section that it is non-binding and offered for “guidance.” Administrative agencies do sometimes publish statements about the interpretation of their own regulations, but, as the document itself indicates, this document is not such an interpretation. In addition, the law does not require judicial officials to adopt agency interpretations of their own regulations, even when they are official. The degree of deference a court gives an agency interpretation of a rule is a determination made based upon analysis of a number of factors, a discussion of which is far beyond the scope of this post. Suffice it to say that the contents of the Guidance Document are significant to court officials if, and only to the extent that, the court determines them to be so.

For the most part, the Guidance Document simply reiterates the provisions of the CDC Order. In two portions, however, it goes beyond the CDC Order to address the two issues discussed above. In regard to the landlord’s right to challenge the accuracy of the Declaration provided by a tenant, the Document states, “The Order does not preclude a landlord from challenging the truthfulness of a tenant’s declaration in any state or municipal court. The protections of the Order apply to the tenant until the court decides the issue as long as the Order remains in effect.”

It must be observed that a statement that “The Order does not preclude” a particular action is not equivalent to an affirmative statement that the action should be allowed. A generous reading of the quoted sentences suggests that a landlord confronted with a Declaration containing falsehoods is not relegated to the faint hope of a speedy and successful prosecution for perjury, but may be allowed to raise the issue in a summary ejectment action. Unfortunately, this “guidance” leaves a host of fundamental questions unanswered, including those related to the permissible scope of the inquiry, the burden of proof, and the legal standard to be applied.

The second portion of the Guidance Document of considerable interest relates to the question discussed above: exactly what behavior by a landlord constitutes a violation of the CDC Order? Here's what the Guidance Document says:

As indicated in the Order, courts should take into account the Order's instruction not to evict a covered person from rental properties where the Order applies. The Order is not intended to terminate or suspend the operations of any state or local court. Nor is it intended to prevent landlords from starting eviction proceedings, provided that the actual eviction of a covered person for non-payment of rent does NOT take place during the period of the Order. State and local courts may take judicial notice of the CDC Order, and the associated criminal penalties that may be imposed for non-compliance in making a formal judgment about any pending or future eviction action filed while this Order remains in effect.

Once again, the Guidance Document uses language that requires interpretation. It seems reasonable – to me, at least – to interpret the statement that the CDC Order is "not intended to prevent landlords from starting eviction proceedings" to mean that a landlord does not violate the CDC Order by filing an eviction action. I understand the rest of that sentence to state that actual eviction of a protected person for non-payment of rent does violate the Order. Some advocates argue that the proper meaning of this sentence is that only execution of a writ of possession (i.e., removal of the tenant) violates the Order. This interpretation necessarily means civil courts will rarely need to be concerned with the CDC Order, because actual removal of a tenant occurs after the court system is done with a case. In North Carolina, sheriffs are charged with removing evicted tenants from rental property.

But if this is the proper reading of this language, what is meant by the introductory sentence stating that "*courts should take into account the Order's instruction . . .* "? And the final sentence, allowing courts to take judicial notice of the Order "*in making a final judgment about any . . . eviction action*" while the moratorium is in place?

This language clearly indicates that courts should play a role in these cases, but further consideration produces considerable confusion about what that role should be. One interpretation is that courts have some preventive role to play – in other words, the landlord has not violated the Order merely by filing the lawsuit, but the action should not go forward in light of the anticipated violation that would occur if the landlord obtained and enforced a judgment for possession. Does this mean a continuance would be appropriate? Apparently not, in light of the reference to "a final judgment" in the language quoted above. If a continuance is not appropriate in this circumstance, should the court dismiss the eviction (presumably without prejudice)? This seems like an odd result, given the simultaneous authorization for landlords to file the action to begin with. Frankly, I am unable to offer an interpretation of this section of the Guidance Document free of troubling inconsistencies.

EO 171 & Accompanying FAQ Document

The Governor's Executive Order furnished some badly-needed answers to questions about the procedural implementation of the CDC Order. These basic procedures applicable in all summary ejectment actions heard on or before December 31 (subject to extension) are simply stated:

1. Landlords are responsible for providing tenants with blank Declaration forms and are required to furnish an affidavit swearing that they have done so. (Applicable to actions filed on or after October 30.)
2. Landlords are required to immediately notify the court upon receipt of a Declaration and provide a copy to the court within five days of receipt. A single Declaration executed by the tenant bound by the lease is sufficient to trigger protection from eviction under the EO.
3. A landlord's receipt of a Declaration prevents the action from going forward UNLESS the landlord files a written Response stating reasons for the action to proceed despite the prohibitions of the CDC Order.
4. The court must hold a hearing on the issue of whether the eviction should be allowed to proceed.
5. If a Declaration is filed and not successfully contested, a landlord is prohibited from seeking a writ of possession. If no Declaration is filed, or if one is filed but successfully contested, this prohibition does not apply.

Other Important Things to Know about EO 171:

1. The EO is to be enforced by state and local law enforcement. Violation of the Order is a Class 2 misdemeanor.
2. In addition to "covered persons" under the CDC Order, applicants to the HOPE Program are covered if they have been notified that they are eligible for participation in that program.
3. EO 171 is independent of the CDC Order "and shall be in force regardless of any repeat, recission, amendment, or administrative interpretation" of that Order.
4. The Order does not prohibit evictions for reasons unrelated to the payment of rent.
5. The Order does not relieve tenants of their contractual obligation to pay rent.

Frequently-Asked Questions (and a few answers) about EO 171 & the FAQ Document:

Is there an AOC affidavit form for landlords to use?

There is no AOC form affidavit available for landlords to use for this purpose, but meeting this requirement is simple. The plaintiff need only provide a written statement asserting that the landlord has provided the tenant with a blank copy of the Declaration, followed by the following language: *"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true. (Signed)* _____" *See* Emergency Directive 5, by Chief Justice Beasley. [Note that the same rule presumably applies to Declarations executed by a tenant.]

What should a judicial official do – if anything – if the SE action was filed prior to October 30 and

the landlord has not provided the tenant with a blank Declaration and/or completed an affidavit?

Note that the landlord has not violated the law in this instance, and so no action by the judicial official is required. Some judicial officials may wonder what action is allowed in this situation. I believe this decision is a matter of discretion for judicial officials. EO 171 indicates the concern that tenants entitled to protection may be unaware that protection is available, and that evictions in this circumstance are undesirable as a matter of policy. For this reason, some judicial officials may decide to take an active role in this situation. Possibilities include informing the tenant of the CDC Order, providing the tenant with a blank Declaration, continuing an action to give a tenant time to seek information about the CDC Order and/or obtain and submit a Declaration. Balanced against this approach is of course a profound concern with maintaining the court's role as a neutral and impartial forum, particularly with regard to the appearance of the court's impartiality. Drawing the line between "informing" and "assisting" is challenging. As discussed below, judicial officials are faced with a similar decision related to ignorance on the part of landlords.

What should a judicial official do if the landlord fails to provide the required affidavit?

Again, I believe this decision is a matter of discretion for judicial officials. In this instance, the landlord has violated the law, and I believe a judicial official is compelled to take some sort of action in response. (It is not logical to place the burden of raising this violation on the tenant, when the stated purpose of the requirement is to inform tenants of the law who may be otherwise unaware.) Two broad alternatives are (1) to assist a landlord in complying or (2) punish a landlord who fails to comply. Choosing between these alternatives may involve consideration of whether the landlord is aware of the requirements of EO 171 as well as whether the violation is limited to failure to provide an affidavit as opposed to failing to give the tenant a blank Declaration. In this situation, the menu of options includes providing an affidavit for the landlord to execute immediately, granting a continuance to allow the landlord to comply, and dismissing the action (whether in response to defendant's motion or *sua sponte*) in response to the landlord's violation of the law.

Is there a deadline for the tenant's submission of a Declaration or a landlord's filing a Response?

No. The CDC Order does not impose any deadline for a tenant to provide a landlord with a Declaration to be protected from eviction under that Order. Many tenants will be unaware of the CDC Order until the landlord provides them with a blank Declaration, which may occur just prior to trial. Furthermore, a tenant's financial circumstances may change suddenly, resulting in a Declaration being provided at the last minute, sometimes even after judgment has been entered.

Similarly, EO 171 does not establish a deadline for a landlord to file a Response. In a situation in which a tenant has provided a Declaration at or shortly before trial, it may be appropriate for the court to inquire whether the landlord would like the case to be continued for a time sufficient to allow the landlord to make a decision about whether to file a Response. Similarly, if a landlord files a Response at or shortly before trial, the same action may be necessary to allow the tenant

sufficient time to prepare for the hearing. This may be particularly likely, for reasons related to due process, when the reason asserted by the landlord in the Response is the accuracy of the assertions contained in the Declaration, as opposed to a determination of the grounds for eviction.

What action can a landlord take if the landlord has received a Declaration but believes that eviction is allowed under current law?

The landlord can file a written Response stating the reasons which support this assertion. Filing a Response triggers a hearing on the issue of whether the eviction should be allowed to proceed.

What are the most likely reasons an eviction should be allowed to proceed?

EO 171 gives as an example an eviction based on grounds unrelated to the payment of rent or related fees. Because neither state nor federal rules prohibit evictions in this situation, the task of a judicial official in this case to simply to determine the grounds for eviction. There are two common errors made by judicial officials here. First, remember that a plaintiff is not bound by the box checked on the complaint form. Self-represented litigants quite often check the wrong box on the complaint form. While that error may sometimes raise due process concerns about whether the defendant has received adequate notice, it is not determinative – or even particularly informative – of the legal basis for the plaintiff's eviction case. Second, it doesn't matter whether a plaintiff is asking for money damages in addition to summary ejectment. It is quite common for the events leading up to an eviction--for any number of reasons-- ultimately to involve a tenant who stops paying rent. Remember that there is no moratorium on a landlord seeking a money judgment. We are concerned here only with the legal basis for the judgment for possession in determining whether the CDC moratorium applies

So how does a magistrate determine the grounds for eviction? By considering the evidence presented by the landlord in support of the claim for possession. A landlord prevails in a summary ejectment action only by establishing each essential element associated with any one of the four grounds. If a landlord's path to eviction necessarily involves evidence of nonpayment of rent, EO 171 applies.

What this means is that a hearing on a landlord's Response alleging "Other Grounds" will look very much like a summary ejectment trial itself. In essence, a landlord seeks to prove that the action is based on a permissible ground by introducing evidence demonstrating the applicability of that ground. There is no reason to hold a bifurcated proceeding in this instance, conducting first the hearing on the Response followed by a trial on the claim itself. If the evidence establishes the landlord's right to recover under any one of the permissible grounds, the landlord is entitled to a judgment awarding possession.

Another basis upon which a landlord may assert that the moratorium does not apply to this tenant – even though a Declaration has been provided – is an assertion that the Declaration is not valid.

Validity issues arise when a Declaration is not signed, does not contain the "under penalty of perjury" language, or fails to include one of the required assertions. The most frequent reason for a challenge to the Declaration's validity, however, is likely to be that one or more of the required assertions in that document are false. As discussed previously, the CDC Order itself is silent on whether a challenge for any reason should be allowed, and the subsequent statement by the Guidance Document is not binding on judicial officials. While the subject is very briefly mentioned only once in EO 171, the accompanying FAQ document specifically permits a landlord to file a Response asserting that the tenant has made false statements in the Declaration – and thus that is presumptively the applicable rule at this point. When a Response makes this assertion, the next step is a preliminary hearing directed at determining whether the eviction should proceed.

This hearing is likely to look quite different from the one described above. While an incomplete Declaration is likely to simply be corrected by the tenant, more troublesome issues arise when the challenge is to the truth of the tenant's assertions. EO 171 does not provide an answer to the predictable questions from judicial officials related to this hearing: Is the landlord required to specifically identify the alleged falsehood in the Response? Does the reference to "false statements" apply to all five assertions in the Declaration, or only to those which are verifiably and demonstrably false? In other words, does the level of deception contemplated equate to that required to deem a statement purjurious? For example, if a landlord asserts that a tenant has not, in fact, used "best efforts to make timely partial payments to the landlord," is the Court called upon to review the tenant's financial situation and determine whether the tenant should have made different decisions about allocation of funds? Or is "best efforts" so subjective that the statement is demonstrably false only in the most extreme circumstances? And, finally, who has the burden of proof on the issue of the factual accuracy of these assertions, and what is the applicable legal standard?

These are important questions for judicial officials to resolve. Requiring a landlord to identify a factual basis for challenging the truthfulness of a specific assertion in the Declaration, for example, is obviously quite different from permitting a landlord to simply say "I challenge the Declaration," and then conduct a wide-ranging cross-examination related to a tenant's employment history and status, financial status, efforts to borrow money, find alternative lodging, and so on. Judicial officials, in the exercise of their discretion, will have to make decisions about how narrow or broad the scope of this inquiry will be permitted to be, walking a fine line in balancing their obligations under GS 8C-1, Rule 611:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

What happens when a landlord receives a Declaration after obtaining a judgment for possession?

The issue arises as to both the CDC Order and EO 171. Clearly, a landlord who removes a tenant from residential housing after having received a Declaration has, nothing else appearing, violated the CDC Order. EO 171, on the other hand, prohibits a landlord from requesting a writ of possession in the same circumstances. Both of these actions are definitionally post-judgment, and both violations are subject to the imposition of criminal penalties. But what role, if any, do the courts play?

EO 171 appears to provide an answer, at least to some degree. Sec. 2 of the Order states:

1. *Writs of Possession*
2. *Upon receiving a Declaration, the landlord shall take no actions to request a writ of possession, and the landlord is not entitled to the writ, but the landlord may submit a response to the Declaration as stated above in Subsection D.*

Because a landlord can request a writ of possession only after judgment is entered, it seems reasonable to read this provision as governing post-judgment procedure. *Subsection D*, of course, refers to the landlord's right to submit a Response stating reasons "why the action should still proceed." This creation of a procedure for a post-judgment hearing is a direct, practical solution to a unique problem, and is not grounded in current rules of procedure. Consequently, the details of its implementation are nowhere specified. Local policy is likely to fill in these gaps. What follows are merely my own thoughts about this procedure.

First, note that this procedure most clearly applies when a tenant delivers a Declaration to the landlord after judgment has been entered and before a writ of possession has issued. In this situation, a significant event has occurred after judgment was entered, raising the possibility that some further action by the court might be required to avoid an unjust result. EO 171 provides for a hearing on the landlord's post-judgment Response, the outcome of which will determine whether the landlord can lawfully request a writ of possession. I believe the hearing contemplated at this post-judgment stage should be conducted by a district court judge. The scope of a magistrate's authority to act in a case after judgment has been entered and no statute specifically authorizes such action is questionable. See discussion in Chandak v. Electronic Interconnect, NC Court of Appeals 2001.

The procedure set out in EO 171 is not designed for the situation in which a landlord has previously obtained a writ but receives a Declaration before the writ is executed. Remember, though, that the (only crystal clear) violation of the CDC Order occurs when a writ is executed. The result is that district court judges may continue to see motions for TROs and preliminary injunctions—accompanied by an unfair trade practice or other substantive claim – in this circumstance.

I've only scratched the surface of the legal issues presently confronting judicial officials in eviction cases. As I said at the outset, many of these issues would benefit from a deeper and more

thorough analysis. Given the many unanswered questions raised by these four documents, independent judicial officials are called upon to interpret “the law” in this moment as best they can. I hope you have found this overview more enlightening than frustrating, and I welcome your thoughts on any of the matters I’ve discussed. You can reach me by emailing me at Lewandowski@sog.unc.edu.