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A BASIC ROADMAP FOR HANDLING NONPAYMENT ACTIONS

MICHIGAN'S SUMMARY PROCEEDINGS ACT¹ provides a fast and simple procedure for the recovery of real property, particularly where the action is based on nonpayment of rent. Due to their reliance on approved forms, nonpayment actions can be handled by attorneys with little or no expertise in real estate law. This is particularly true of residential evictions, where the typical reason for nonpayment is simply the tenant's inability to pay. The purpose of this article is to provide the landlord's attorney with a basic roadmap for handling nonpayment actions.

BY LAWRENCE SHOFFNER

The Sources

The procedures for eviction are set forth in the Summary Proceedings Act and Michigan Court Rule 4.201. MCR 4.201, which is available online at the Michigan Courts website,² provides direction on everything from the preparation of the complaint to the filing of the appeal. The State Court Administrative Office (SCAO) has prepared a corresponding series of special forms for use in eviction actions. There is a SCAO form for:

- the demand for possession
- the summons
- the complaint
- escrow orders
- the judgment of possession
- the order of eviction

These forms can be obtained from the court clerk and are also available at the SCAO website.³ In addition to convenience, there are important reasons to use the SCAO forms. The judges and court clerks are familiar with these forms and will expect to see them used. Moreover, the forms are specially designed to comply with the requirements imposed by the Summary Proceedings Act and the Michigan Court Rules. Many of these requirements have been incorporated into the approved forms, thereby helping to ensure compliance.

Eviction Timeline

The first question typically asked by the landlord is this: "How long will it take to evict the tenant for nonpayment of rent?" In most instances, an eviction for nonpayment can be completed in about a month. However, if the tenant appears and raises a factual defense, the period can easily become several months. If the tenant prevails on its defense, it may ultimately remain in possession until the end of its term. The following timeline will help to provide an overview.

If the landlord elects to serve by mail, the eviction process starts on Day Zero with service of the demand. Slightly more than a week must pass between the mailing of the demand and the filing of the complaint. Although the action begins with a "seven-day demand," the actual period is usually longer due to the additional time requirements imposed by various rules.⁴ The demand period usually runs to around Day Eight.

After the demand period has elapsed, the complaint can be filed. In most district courts, the court clerk schedules the matter for trial when the complaint is filed. The period between the filing of the complaint and the initial trial date is generally within 10 days.⁵ This period may have to be extended, however, if the summons and complaint cannot be served on the tenant at least three days before the scheduled trial date.⁶ The initial trial date is generally around Day 17.

FAST FACTS

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If the initial trial date results in a judgment, there is an additional 10-day period in which the tenant may redeem its leasehold by paying the delinquent rent. If the rent is not paid, the landlord may apply to the court for an order of eviction. The order of eviction is usually entered around Day 28. If the tenant doesn't move, the court officer must make arrangements with the landlord for the eviction. This will take some additional time, but the period is typically days rather than weeks. Because the tenant usually pays the rent or moves out before being physically evicted, the matter is often resolved in less than a month.

If the tenant appears on the initial trial date with a factual defense, the process can take substantially longer. By raising a defense and filing a jury demand, the tenant can prolong the procedure, perhaps by several months. Although the court rule requires the action to be tried within 56 days,⁷ this mandate is not always honored, particularly in commercial cases. After the judgment is entered, the tenant has the right to appeal, which can take another couple of months. All told, a nonpayment action can take less than a month or as long as a year, depending on the nature of the defense and how hard the tenant fights. With this overview in mind, we turn to the details of the procedure.

Eviction Procedure

PREPARATION FOR EVICTION

For attorneys, the initial step in the eviction process is to gather information and documents, beginning with the demand and lease. If the landlord has already served the demand, it should be reviewed to ensure that it was properly prepared and served. If there is a written lease, double check the notice and remedy provisions. The landlord's attorney should request a copy of all communications between the parties. An exchange of hostile correspondence is often a sign that the issues will extend beyond the simple inability to pay. Knowledge gleaned from such correspondence will give the attorney some forewarning of issues that may be raised on the initial trial date.

If the tenancy is residential, there are two additional statutes that should be considered. The Truth in Renting Act⁸ imposes various requirements with respect to the contents of residential leases. There may be compliance issues if the landlord is using an older lease form, or a homemade lease that it whipped up to avoid legal fees. Additionally, the legislature has imposed certain covenants into residential leases.⁹ These include an agreement to keep the premises in reasonable repair and to keep the premises and common areas fit for their intended use. A review of these statutes will help the landlord's attorney address questions that may arise during the initial hearing.

DEMAND FOR POSSESSION

A "Demand for Possession Nonpayment of Rent" (DC 100a) is the SCAO form required to start a nonpayment action.¹⁰ Do not confuse this form with those required to commence alternative types of actions, such as the "notice to quit" form used in termination actions. The Summary Proceedings Act is very specific about the contents of the demand.¹¹ The demand must:

- be in writing
- be addressed to the person in possession
- state the address or brief description of the premises
- state the reasons for the demand
- state the amount due
- indicate the time allowed to take remedial action

The demand must be dated and signed by the landlord, its attorney, or agent. If the demand is being sent to a residential tenant, it should be signed and served by the landlord, rather than its attorney, to avoid problems under the Fair Debt Collection Practices Act, which imposes a number of additional requirements on the collection process.¹² Additionally, because the SCAO form consists of several pages, it is important for the landlord to serve the tenant's copy, which states how to get legal help and retain the copy containing the proof of service.

There are several ways in which the demand may be served.¹³ The demand may be served by delivering it personally to the tenant. Alternatively, the demand may be given to a member of the tenant's family or household, or to the tenant's employee with a request that it be delivered to the tenant. If service is made on a person other than the tenant, that person must be of suitable age and discretion, and the service must actually occur at the premises. An equally valid and significantly easier method is to serve the demand by first-class mail addressed to the tenant. If the demand is mailed, the date of service is deemed to be the next regular day for the delivery of mail. Because of this presumption, service by regular mail is usually preferable to other types of service.

SUMMONS AND COMPLAINT

Once the demand period has passed, the landlord can file its eviction action, usually in the district court where the property is located.¹⁴ Again, there are SCAO forms for both the summons (DC 104) and the complaint (DC 102a). The eviction action may be joined with a claim for a money judgment, provided the amount sought in the monetary claim is within the district court's jurisdiction.¹⁵

Although nonpayment actions have their own form of complaint, distinct from other types of eviction, the summons form is the same for all types of eviction. The summons form for eviction actions, however, is not the same as the summons form used in other civil actions. Do not, under any circumstances, use the general civil summons form (MC 01) to begin an eviction action. In most jurisdictions, the court clerk will schedule the initial trial date and write that date directly on the summons form when the action is filed. The summons must include advice to the tenant on several matters, such as its right to an attorney.¹⁶ These advice requirements are easily met through use of the SCAO form.

MCR 4.201(B) establishes a number of requirements for the eviction complaint. The complaint must:

- comply with the general pleading requirements
- describe the premises
- allege nonpayment of rent
- state the rental periods and rate
- state the amount due when the complaint was filed
- indicate the dates on which additional payments will become due

A copy of the demand must be attached to the complaint, along with a copy of the lease, if there is one. If the tenancy is residential, the complaint must allege that the landlord has kept the premises in reasonable repair and that they are fit for their intended use, unless those obligations have been modified by agreement.¹⁷ If the tenancy involves housing operated by or under the rules of a governmental unit, the complaint must contain

specific reference to the rules or law establishing the basis for ending the tenancy.¹⁸

SERVICE OF PROCESS

MCR 4.201(D) is very precise on the question of service. A copy of the summons and complaint must be served on the tenant by mail. Unless the court does the mailing and keeps a record, the landlord must attach a postal receipt to the proof of service. In addition to the mailing, the tenant must also be served in one of three ways: by one of the methods provided in the general court rules; by delivering the papers at the premises to a member of the tenant's household of suitable age, who is informed of the contents, and who is asked to deliver the papers to the tenant; or by posting on the premises, assuming certain conditions have been met.¹⁹ If the local court offers service by a court officer, always accept that opportunity. The judge will trust the propriety of such service, which will be particularly important if the tenant fails to appear and the landlord wants a default judgment.



THE INITIAL TRIAL DATE

The tenant may appear on the initial trial date and assert its answer orally.²⁰ Unlike other civil actions, eviction cases are scheduled for trial and may even be adjudicated without a written answer to the plaintiff's complaint. This means that the landlord must anticipate defenses that might be raised on the initial trial date. The attorney should discuss potential defenses with the landlord to ensure that appropriate evidence will be ready for presentation.²¹ If the tenant raises a significant defense, or one that the landlord is simply not prepared to meet, the landlord can ask for an adjournment should the issue merit delay.

A SCAO escrow order form (DC 109) and judgment form (DC 105) should be prepared before going to court on the initial trial date. As noted previously, if the tenant raises a meritorious defense and files a jury demand, the judge will adjourn the trial date, sometimes for weeks or even months. If this occurs, the judge will usually order the tenant to pay rent into escrow while the case is pending.²² This is typically accomplished on the landlord's oral motion,²³ which should be made immediately after the judge determines that an adjournment is appropriate. The escrow order should be prepared and ready for entry as soon as the judge rules. Moreover, because time really is of the essence in eviction cases, a judgment form should also be prepared in advance for immediate entry once the judge rules. The last thing the landlord needs is any delay over entry of the judgment.

JUDGMENT, REDEMPTION, AND EVICTION

MCR 4.201(K) contains several requirements for the eviction judgment. The court must mail or deliver a copy of the judgment to both parties before the post-judgment time periods will begin to run. The tenant has three business days to ask the court to set aside a consent judgment if the tenant was not represented by counsel at the time it was entered.²⁴ All nonpayment judgments must state the rent due at the time of trial, which cannot include any accelerated rent, and the time period and conditions for redemption. The judgment must inform the tenant that it may file a post-trial motion²⁵ or an appeal²⁶ within 10 days after the judgment enters.

Unlike termination actions, the tenant has an absolute right of redemption in a nonpayment case. If the tenant pays the amount set forth in the judgment within the redemption period, no eviction occurs.²⁷ Alternatively, the filing of a post-trial motion may stay the eviction, provided certain conditions are met, which may include the filing of a bond and the deposit of an additional month's rent into escrow. If the tenant files a claim of appeal, the court must stay the eviction if the tenant also posts an appeal bond and continues to pay rent into escrow while the appeal is pending. Because the court rule provides a truncated appeal period from possessory judgments, both parties must be careful about timing if they plan to appeal.

Obtaining a judgment is not the final step in the eviction process. If the tenant fails to pay the amount due and does not otherwise obtain a stay of enforcement, the landlord may request an order of eviction,²⁸ which is also referred to as a "writ of restitution" by the Act. The request is made by application, which is incorpo-

rated into the SCAO order of eviction (DC 107). Once the order has been signed by the judge, the landlord must contact the court officer, who will then serve the order on the tenant. If the tenant fails to leave, the court officer will work with the landlord to make arrangements for the physical eviction. Once the tenant is evicted, the landlord may change the locks and again assume full control over the property.

Proceedings Summary

Most actions based on nonpayment of rent can be easily handled using the SCAO forms, the Michigan Court Rules and a little common sense. The key is to stick to the SCAO approved forms. In most instances, the matter will be resolved in about a month. ♦



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Footnotes

1. MCL 600.5701, et seq.
2. <http://courts.mich.gov>.
3. <http://courts.michigan.gov/scao/courtforms/index.htm>.
4. MCL 600.5718 adds a day if service is made by mail. MCR 1.108(1) adds time for holidays and weekends.
5. This period may be modified by local court rule. MCL 600.5735(4). The following district courts have adopted such rules: 2A, 12th, 18th, 27-2nd, 81st, 82nd and 95-B.
6. MCL 600.5735(2)(b).
7. MCR 4.201(J)(1).
8. MCL 554.631, et seq.
9. MCL 554.139.
10. MCL 600.5714(1)(a).
11. MCL 600.5716.
12. 15 USC 1692, et seq. See, "Michigan Summary Proceedings and the Fair Debt Collection Practices Act: A Sea Change for Landlord's Lawyers?" 26 *Michigan Real Property Review* 31 (1999).
13. MCL 600.5718.
14. MCL 600.5706.
15. MCR 4.201(G).
16. MCR 4.201(C)(2).
17. MCR 4.201(B)(2)(c). Michigan law imposes implied covenants of fitness and repair in residential tenancies, but allows these obligations to be modified in a lease having a current term of at least one year. MCL 554.139.
18. MCR 4.201(B)(2)(b).
19. MCR 4.201(D)(3).
20. MCR 4.201(F)(1)(b).
21. It may be helpful to review "Real Evidence: Special Rules for Real Estate Disputes," 80 *Michigan Bar Journal* 28 (2001).
22. MCR 4.201(H).
23. This is permissible under MCR 119(A)(1).
24. MCR 4.201(I).
25. MCR 4.201(M).
26. MCR 4.201(N).
27. MCL 600.5744(4) & (6).
28. MCR 4.201(L).