

SUPREME COURT, CIVIL BRANCH
BRONX COUNTY
851 Grand Concourse

HELP CENTER
Room 121

How to Vacate a Default

Note: All persons involved in a lawsuit should consult an attorney. This office gives you information, forms and instructions on court procedures. As an office of this court we cannot give legal advice or act as your advocate.

If a self represented defendant defaults, that is, takes no action after being served with a summons with notice or summons and complaint, he or she may wish to try to vacate that default. Otherwise, the defendant may find, within a brief period after the default, that a judgment had been entered against him or her for the relief that the plaintiff demanded in his or her complaint, with possibly severe consequences to the defendant (e.g., damage to one's credit rating, seizure of assets, freezing of bank accounts).

The device for trying to undo a default is a motion to vacate a default. A motion is a request to the court that is made within an existing lawsuit and seeks to have the court take some action concerning that lawsuit.

Whenever a motion is to be brought, the party bringing the motion (the **movant**), here the self represented person, must initiate the motion papers. There are two ways to bring on a motion: by notice of motion; or by order to show cause.

A. Proceeding by Notice of Motion

A notice of motion advises all the other parties to the action that the motion is being sought, what the motion asks for, what the supporting papers are, what the reasons for the motion are, and when and where the motion will be heard, when, that is, it will be formally presented to the court for decision (the return date). See CPLR 2214(a).

The movant must submit with the notice of motion, an affidavit or other proof that explains the nature of the motion and the reasons therefor and to which are attached copies of all documents needed in order to understand the motion. The movant on a motion to vacate a default must submit papers satisfying certain legal standards or else the motion will be denied. He or she will have to support the motion with an affidavit demonstrating, by reference to specifics, not vague generalities, that there is a defense to the complaint. Second, the affidavit must demonstrate, again by reference to specifics, an acceptable excuse for the default. The court is not interested in vacating a default on behalf of a defendant who has not got a leg to stand upon or that came

about because the defendant was irresponsibly inattentive to the case.

The movant, then, must prepare a notice of motion and attach to it an affidavit complying with the standards just described. The affidavit must be signed and sworn to in front of a notary, who will also sign the document at the bottom.

All other parties to the case must have a chance to present their ideas or argument concerning the motion before the court decides it. This is a matter of basic fairness. The movant therefor must serve the papers on all parties. That is, he or she must have a person over the age of 18, who is not a party to the case, mail or deliver a copy of the papers to the attorneys for all parties. Certain deadlines must be observed.

For all motions, at least eight days' advance notice must be given to all other parties if the papers are served by hand, and at least 13 days' notice must be given if the papers are mailed (five days are added where papers are served by mail). Answering papers to the motion must be served at least two days before the return date. However, if the notice of motion and other moving papers are served at least 12 days before the return date by hand (or at least 17 days before by mail), and if the notice of motion demands that answering papers be served at least seven days before the return date, then the answering papers must be served at least seven days by hand (12 days by mail) before the motion is to be heard. CPLR 2214(b). Provision is also made in the rules for reply papers, which are papers presented by the moving party in which the moving party responds to the arguments of his or her adversary in the answering papers (but does not present new matter). No other papers are permitted by the CPLR on a motion.* A movant is permitted to submit reply papers only where the motion papers have been served at least 12 days before the return date and the movant has properly requested that answering papers be served a least seven days before the return date.

All motion papers must be served by mail or by hand upon all parties to the case who have not defaulted in appearing (that is, all parties except those whose time to answer has already expired and who are now in default), even if the motion does not seek relief against some of them. An affidavit of service must be prepared; one original should be retained by the moving party and the other original should be attached to the papers submitted to the court so that the court can be certain that timely notice was afforded to all other parties to the case.

If the case has never come to court before, the movant will have to cause a Justice to be

* However, the CPLR does provide that when a motion is made, another party may make a motion of his or her own in response, known as a cross-motion. CPLR 2215

assigned to the case. This is done by the purchase of a Request for Judicial Intervention. For more on this subject, see How to File a Request for Judicial Intervention.

The original moving papers must be delivered to the Motion Support Clerks Office, Room 217, at least 5 business days prior to the return date so that the motion may be recorded in the court's computer system and placed on the calendar. In the first instance, the place at which the motion will be returnable is the Motion Support Clerks Office Room 217. No argument of any motions takes place there. (Argument of motions takes place only when, where and if the assigned Justice directs.) This is so for all motions brought in our court by notice of motion. The parties are free upon agreement to adjourn motions (within limits) so as to accommodate their schedules. Answering and reply papers are to be served upon all other parties to the case within the deadlines applicable. **The original answering and reply papers (to which must be attached proof that the papers were served on all other parties) must be delivered to the Motion Support Clerks Office Room 217 on the return date.**

Once the motion is marked submitted in Room 217, it is either sent to the Justice assigned to the case for decision or is scheduled for oral argument in front of that Justice. This depends upon the procedures adopted by the Justice in question.

B. Proceedings by Order to Show Cause

Another means by which to make a motion is an order to show cause. This device is intended to be used when there is urgency or when the movant seeks a stay of some sort from the court, that is a temporary prohibition (e.g., a stay against a bank's freezing of assets of the defendant).

An order to show cause (an example of which is attached) is a request for relief by motion, but, unlike a notice of motion, it is presented to a judge and signed by him or her. It requires the other parties to the case to appear on a certain date at a certain time (the return date) at a certain place and to state reasons why the movant should not receive the relief asked for in the motion.

The movant must prepare an order to show cause for his or her case. The return date should be left blank since that will be filled in by the Justice who signs it. Attached to the order should be the affidavit of merit and excuse, as described above, and any necessary attachments to that affidavit (e.g., a copy of the complaint). If there is a memorandum of law, it should be submitted at this time as well. These papers must then be presented to the court.

When the papers are ready, they must be presented to the Ex Parte Office, Room 217. That office will review the papers for form. The papers will be delivered to the Justice

and, if found satisfactory, signed by him or her. The Justice will fill in the return date and will specify when and how the papers should be served on all other parties. The Ex Parte Office will notify you when this has been done.

When the order has been signed, the movant must "conform" a copy", that is, reproduce on a copy of the papers each and every marking made thereon by the Justice. This copy must then be photocopied and served upon the attorneys for all parties to the case in the manner and within the deadline set by the Justice.

After service is made, the movant must see to it that an affidavit of service is prepared. The original must be presented to the court on the return date. If other parties do not submit opposing papers and do not appear on the return date, the court may take action on the motion provided that it is satisfied from the affidavit of service that the other parties were informed about the motion.

The other parties may submit papers in opposition to the motion. This ordinarily will be done within the time specified by the Justice when the order to show cause is signed.

[Print in black ink to fill in the spaces next to the instructions]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X

[fill in name(s)] Plaintiff(s)

Index No.

-against-

_____/____

NOTICE OF MOTION

[fill in name(s)] Defendant(s)

-----X

PLEASE TAKE NOTICE that upon the attached affidavit of

_____ [your name(s)], sworn to on
_____, 20____, [date Affidavit in Support notarized], and the
exhibits attached to the affidavit, and upon all proceedings in this case
to date, the plaintiff(s)/defendant(s) [circle one and name the party
making this request] _____ will move in this
Court, at 9:30 A.M. on the ____ day of _____, 20____, [return
date] at the Courthouse, 851 Grand Concourse, Bronx, New York, in the
Motion Support, Clerks Office Room 217, for an order, pursuant to
_____ [insert Statute that applies], granting the
following relief to the movant(s): [briefly describe what you are asking
the Court to do]

and granting such other and further relief as this Court may deem just and
proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to Civil Practice Law and Rules 2214(b), you are hereby required to serve copies of your answering affidavits on the undersigned no later than the seventh day prior to the date set above for the submission of this motion. [For this paragraph to apply, motion papers must be served by personal delivery no later than 16 days before the return date or served by mail no later than 21 days before the return date].

Dated: _____, New York

_____, 20____
[date affidavit signed]

Respectfully submitted,

[sign your name]

[print your name, address and telephone number]

To: Attorney for Plaintiff(s)/
Defendant(s) [circle one]

[print name, address and telephone number]

[Print in black ink to fill in the spaces next to the instructions]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X

[fill in name(s)] Plaintiff(s)/Petitioner(s)

Index No.

-against-

_____/____

AFFIDAVIT

IN SUPPORT

[fill in name(s)] Defendant(s)/Respondent(s)

STATE OF NEW YORK
COUNTY OF _____

ss:

[your name],

being duly sworn, deposes and says:

1. I am the plaintiff/petitioner/defendant/respondent [circle the right one] in this matter. I make this affidavit in support of this motion for an order [Describe what you are asking the Court to do. This relief must also be stated in the Notice of Motion or Order to Show Cause]. _____

2. I believe the Court should grant this motion because [Explain why you should be granted what you are requesting. Attach any exhibits. Use more paper if needed]. _____

3. [If you are moving by Order to Show Cause you must fill in this paragraph.] No prior application has been made for the relief sought herein except: [List all prior requests for the same relief made in this or any other court and the results of those applications. Use more paper if needed. If no prior requests have been made, write "none"].

WHEREFORE, I respectfully request that this motion be granted, and that I have such other and further relief as may be just and proper.

Sworn to before me on the
____ day of _____, 20__

[sign your name before a Notary]

Notary Public

[print your name]

[Print in black ink to fill in the spaces next to the instructions.
Other spaces are for Court use.]

At IAS Part ____ of the Supreme
Court of the State of New York
held in and for the County of
Bronx at the Courthouse,
thereof 851 Grand Concourse,
Bronx, N.Y., on the ____ day of
____, 20__.

PRESENT: HON. _____
Justice of the Supreme Court
-----X

_____,
[fill in name(s)] Plaintiff(s)
-against-

Index No.

_____/____

ORDER TO SHOW CAUSE
WITH T.R.O.
IN CIVIL ACTION

_____,
[fill in name(s)] Defendant(s)
-----X

Upon reading and filing the affidavit of _____

_____ [your name(s)] sworn to on _____,
20__, [date the Affidavit in Support notarized] and upon the exhibits
attached to the affidavit, and [identify other supporting papers, such
as, additional affidavits]

Let the party or attorney in opposition show cause at IAS PART
____, Room _____, of this Court, to be held at the Courthouse, 851 Grand
Concourse, Bronx, N.Y., on the ____ day of _____, 20__, at
_____ o'clock in the ____ noon or as soon as such party or attorney
may be heard why an order should not be made, providing the following
relief: [describe what you are asking the Court to do] _____

for the reasons that [briefly describe the reasons why you should be granted what you are requesting]

Pending the hearing of this motion it is ORDERED that: [write here what action you want stayed]

Sufficient cause appearing therefor, let personal service of a copy of this order, the affidavit in support, and all other papers upon which this order is granted, upon all parties to this action or their attorneys, who have appeared in this action, on or before the ____ day of _____, 20____ be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date directed in the second paragraph of this order.

ENTER

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Affidavit of Service After Commencement of Litigation

_____ against _____ Index No. _____/_____

STATE OF NEW YORK, COUNTY OF _____ ss:

I, _____, [name of person who served papers],
being duly sworn, depose and say: I am over 18 years of age and am not a party to
this case. I reside at [your address] _____

On _____, 20____ [date of service], at _____ AM/PM, [time of day], I served a
true copy of the following papers: [identify papers served] _____
_____, in the following manner. [check box that applies]

Personal Service By personally delivering the papers to _____ [identity
person served] at _____ [address].

The individual I served had the following characteristics [check the right boxes]

<u>Sex</u>	<u>Height</u>	<u>Weight</u>	<u>Age</u>
<input type="checkbox"/> Male	<input type="checkbox"/> Under 5"	<input type="checkbox"/> Under 100 lbs.	<input type="checkbox"/> 21-34 years
<input type="checkbox"/> Female	<input type="checkbox"/> 5'0"-5'3"	<input type="checkbox"/> 100-130 lbs.	<input type="checkbox"/> 35-50 years
	<input type="checkbox"/> 5'4"-5'8"	<input type="checkbox"/> 131-160 lbs.	<input type="checkbox"/> 36-50 years
	<input type="checkbox"/> 5'9"-6'0"	<input type="checkbox"/> 161-200 lbs.	<input type="checkbox"/> 51-65 years
	<input type="checkbox"/> Over 6'	<input type="checkbox"/> Over 200 lbs.	<input type="checkbox"/> Over 65 yrs.

[describe]: Skin color _____ Hair color _____

Other identifying features, if any [describe]: _____

Mail By mailing the same in a sealed envelope, with postage prepaid thereon, in a post
office or official depository of the U.S. Postal Service within the State of New
York, addressed to the last-known address of the addressee(s) indicated below:

Overnight Delivery Service By depositing the same with an overnight delivery service in a wrapper properly
addressed. Said delivery was made prior to the latest time designated by the
overnight delivery service for overnight delivery. The delivery service used was
_____. [name of delivery service used]

[Name(s) and address(es) of person(s) served]

Sworn to before me this _____ day of _____, 20____

[Sign name before a Notary]

Notary Public

[Print your name]