

## SELF-HELP CENTERS

**NOTE: PERSONS WITHOUT COUNSEL ARE ADVISED TO CONSULT AN ATTORNEY. COURT STAFF MAY NOT GIVE LEGAL ADVICE, PREPARE YOUR PAPERS OR ACT AS YOUR ATTORNEY.**

### HOW TO VACATE A DEFAULT

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 (set aside) that default. Otherwise, the defendant may find, within a brief period after the default, that a judgment has 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 account(s)). The device for trying to undo a default is a motion to vacate a default. A motion is a request to the court for a specific order that is made within an existing lawsuit and that 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, or moving party) here the self-represented person, must initiate the motion process. There are two ways to bring on a motion: (i) by notice of motion; or (ii) 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 brought, 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 the Civil Practice Law and Rules (the CPLR for short) Section 2214(a). An example of a notice of motion is annexed hereto as Exhibit 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 public, who will also sign the document at the bottom.

All other parties to the case must have a chance to present their ideas or arguments 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 of the age of 18 or older 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, [that is Personal Service] 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 must be served at least seven days by hand (12 days by mail) before the motion is to be heard then as demanded the answering papers must be served at least 7 days before the motion is to be heard (I 2 days if served by mail). 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 raised by his or her adversary in the answering papers (but reply papers may 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 twelve days (I 7 days if by mail) before the return date and the movant has properly requested that answering papers be served at least seven days before the return date.

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<sup>1</sup> 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.

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 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. (This is extremely unlikely when a movant is seeking to vacate a default)

The original moving papers must be delivered to the Court Clerk's Office at least five 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 Courtroom of the assigned Justice (The proper title of a judge assigned to Supreme Court is Justice). Usually no oral argument of any motions takes place there. (Argument of motions usually 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 assigned Justice's Courtroom at the call of the calendar at 9:30 AM on the return date.

Once the motion is marked submitted it is sent to the Justice assigned to the case for decision who may or may not schedule the motion for oral argument. This depends upon the procedures adopted by the Justice in question.

#### B. Proceeding 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 (often called a temporary restraining order or TRO for short) 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's assets).

An order to show cause (an example of which is attached as Appendix E) is a request for relief by motion, but, unlike a notice of motion, it is presented to a Justice 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. (That is an affidavit which shows the movant has a valid defense and an acceptable excuse for his/her default), 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 Court Clerk's Office. That office will review the papers for form. If the movant believes he/she requires immediate relief, he/she must prepare an emergency affidavit [Emergency affidavit forms are available from the Public Legal Resource Center], give the emergency affidavit to the clerk and explain that he/she is seeking immediate or emergency relief. The clerk will then tell the movant how to proceed. 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.

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 a stay or TRO has been granted by the assigned justice the movant must appear at the calendar call of the Order to Show Cause. Remember Stays/TRO's granted when the Order to Show Cause usually expires on the Return day of the Motion. If a movant wishes the Stay/TRO to continue until the motion is decided he/she must orally request this at the calendar call of the motion. 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. When this happens, the Justice usually reserves (delays) decision so he/she will have a full opportunity to read all of the papers submitted by the parties and research the law before actually deciding the issue(s) raised by the Order to Show Cause.