

Sample Motion to Vacate:

IN THE SUPERIOR COURT OF THE STATE OF [your state]
IN AND FOR THE COUNTY OF [your county]
Debt Collector (Plaintiff),

vs.

Your Name
Defendant.

No. XXXXXXXXXXXXXXXXX.
MOTION TO VACATE JUDGMENT

COMES NOW defendant (your name), Pro Se and prays this Honorable Court to set aside and vacate the default judgment entered against defendant on _____, 2010. And in support of this motion states as follows.

1. Defendant was served (or not) with plaintiff's lawsuit on _____, and the Answer was accordingly due on or before _____. (This information will likely be in the judgment rendered by the court, the one you are trying to have set aside.
2. Defendant was unable to respond to the petition against him on the date required because of _____ (your reason, make it good!).
3. Plaintiff sought and obtained judgment by default against defendant on _____.
4. Defendant learned about the judgment on _____ and brings this motion as soon as practically possible thereafter.
5. Defendant's failure to respond, and his delay in bringing this motion were not caused by any willfulness or bad faith. Rather, defendant's behavior was excused by _____ (summary of paragraph 2, your reasons).
6. The Court should grant this motion because defendant has an adequate defense against the claims made against him. Plaintiff's evidence submitted to the court at the default hearing did not support the plaintiff's right to any judgment against defendant in that it did not allege or prove that plaintiff purchased or otherwise acquired the right to sue defendant from anyone to whom defendant owed any money. See, Court Record, a true and correct copy of which is attached to this motion. Defendant denies owing plaintiff any money. See (your name) Affidavit Para. ____.
7. Defendant also contests the amount of money allegedly owed. From an examination of the court records, defendant notices the following irregularities: _____. The irregularities appear from only a cursory examination of the records as submitted (or there is no evidence in the record supporting the judgment as required by the rules), defendant believes that there is no evidence to support the amount as reached by the court's judgment, and defendants will be substantially prejudiced if the court does not, in accordance with public policy, grant defendant's request for a hearing on the merits.
8. Defendant attaches a true and correct copy of court records showing that the money allegedly owed is not supported by the evidence.

9. Defendant attaches an affidavit in support of his factual allegations made herein. Wherefore, Defendant respectfully requests that this court vacate its default judgment dated _____ and place the matter back on its calendar for hearing on the merits.

Your signature
Your name printed
Your address and phone number

Certificate of Service

The undersigned declares that on this __ day of __, 2010, he sent a copy of this motion and supporting documents, postage prepaid, to counsel for plaintiff, Joe Blow the lawyer, at _____ (address).

AFFIDAVIT

- I, (your name), swear and affirm the following.
1. I am the defendant in the underlying action before the court.
 2. State the facts, one to a numbered paragraph, of the reason you did not answer the petition within the required time.
 3. I have a meritorious defense to the lawsuit brought against me because... (again, state the facts, one per paragraph).

I certify under penalty of perjury under the laws of the state of your state that the foregoing statement is true.

Signed in [CITY], [STATE] on [DATE].

Signature
Print or Type Name

[make sure you are swearing to things you could actually know]

Memorandum of Law In Support of Motion To Set Aside

Defendant brings his motion to set aside the default judgment entered against him on ____, ____. Defendant's failure to respond timely to the Petition was not caused by any bad faith or willfulness, but rather because of matters beyond his control. [state your reason]. An evaluation of defendant's failure to respond lies within the discretion of the court, *Chase Manhattan Automotive Finance Corp. v. Allstate Ins. Co.* 708 NYS2d 174 (3 Dept. 2000), but this discretion must be guided by the strong public policy in favor of judgment on the merits rather than technicalities. *Mediavilla v. Gurman*, 707 N.Y.S.2d 432, 434 (A.D.1 Dept. 2000). In accordance with all the facts and the law, the court should set aside the default judgment entered against defendant and set the above-styled matter for trial.

Although defendant has been unable to find a case in which medical crisis affecting the defendant and preventing an appearance in court, as in the present case, the court has excused a defendant for failure to respond in time when the illness was of a close relative, *Zaidi v. New York Bldg. Contractors, Ltdl* (2 Dept. 2009), 877 N.Y.S.2d 381; dissolution of business, *Garcia v. Pepe* (2 Dept. 2007), 839 N.Y.S.2d 544; or simple clerical error, *Perez v. Travco Ins. Co.* (2 Dept. 2007), 843 N.Y.S.2d 390. Defendant's reasons for not responding are equally grave. The court must excuse defendant's failure to respond as not willful or in bad faith.

As alleged in the accompanying Motion, the plaintiff's petition against defendant should not have been granted, and defendant has alleged a meritorious defense. [go into as much detail here as possible, restating what you pointed out as wrong in the motion itself and your affidavit. The more the better]

Wherefore, because defendant has shown a reasonable excuse for his failure to respond and a meritorious defense to the action against him such that it would be unjust for the judgment to stand as it was entered, and in consideration of the strong public policy favoring judgments upon the merits, defendant requests this court to set aside its default judgment against defendant and set the matter for trial.

Respectfully,

_____ (signature)

Your name, address, phone number,

Certificate of service (as above)

Sample Motion 2 to Vacate

IN THE SUPERIOR COURT OF THE STATE OF [your state]
IN THE COUNTY OF [your county]

Debt Collector (Plaintiff),

vs.

John Q (Your Name)
Defendant.

No. XXXXXXXXXXXXXXXXXXXX.

MOTION TO VACATE JUDGMENT

COMES NOW defendant John Q, Pro Se, and prays this Honorable Court to set aside and vacate the default judgment entered against him on _____, 20xx. In support of this motion defendant states as follows.

1. Defendant was served with a summons and plaintiff's petition on January 1, 2012, and the Answer was accordingly due on or before February 1, 2012. (This information will likely be in the judgment rendered by the court, the one you are trying to have set aside.)
2. Defendant was unable to respond to the petition against him on the date required because of a severe injury that occurred on January 31, 2012 (your reason, make it good!).
3. Defendant was hospitalized from January 31, 2012 until February 2, 2012, and was unable to come to court on the date set for hearing.
4. Upon leaving the hospital, defendant requested that plaintiff reset the date for trial and, when he learned that there had been a default judgment granted, requested that plaintiff seek vacation of that judgment. Plaintiff refused to do that.
5. Because of defendant's lingering condition, it has taken defendant six weeks to prepare this motion to vacate.
6. Defendant has a defense to plaintiff's claim and denies liability to plaintiff in accord with his Proposed Answer and Counterclaim and his Affidavit attached herein. Defendant incorporates the terms of his counterclaim in this motion as if set forth in its entirety.
7. Defendant's failure to file his Answer was excusable and in good faith and not undertaken for purposes of delay or any other intention whatever. Likewise, this motion is filed in the interests of justice and not for purposes of delay.
8. Wherefore, defendant requests this court vacate its Order and Judgment dated _____, permit him to file the attached proposed Answer and Counterclaim, and for such other and further

relief as this court deems just and proper in the circumstances.

Respectfully submitted,

John Q

3. The debt upon which Plaintiff is seeking to collect is beyond the statute of limitations in that it was incurred on May 6, 1922 and was defaulted with no further payments as of May 31, 1997.

Wherefore, Defendant prays that plaintiff's cause of action be dismissed with prejudice at plaintiff's costs, and that plaintiff be sent forth without remedy, and for such other, and further relief as this court deems proper in all the circumstances.

COUNTERCLAIMS

1. Plaintiff/Counter- defendant Debt Collector, LLC (Debt Collector) is a corporation actively involved in and conducting business in the Your County.

4. At all times relevant to this counterclaim, Debt Collector has been regularly engaged in purchasing debts from creditors and instituting legal actions against debtors to collect the debts, and is, accordingly, a "debt collector" as defined by the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. sec. 1692a.

5. Upon information and belief, Debt Collector purchased a delinquent debt allegedly due an original creditor, with no knowledge whatsoever of the legitimacy or underlying facts of that debt.

6. Upon information and belief, Debt Collector has now, and at the time of filing its petition against plaintiff, had, no information whatever regarding the validity of the debt it alleges was due and owing from defendant.

COUNT I - VIOLATION OF SECTION 1234, Your State Code

7. Defendant realleges and incorporates each of the preceding allegations, 1-6, as if fully stated herein.

8. Pursuant to Sec. 408.556 State Code, plaintiff was required to allege each fact of defendant's alleged default.

9. Plaintiff has failed to allege any facts showing that it is the true party in interest of the debt in question or whether it has legal capacity to sue in the state of your state.

10. Plaintiff failed to allege any facts regarding how the debt was incurred, when any payments were made by defendant and in what amounts, or any information regarding the composition of the alleged debt.

11. Additionally, plaintiff drafted the petition with the false claim that it was the actual debtor and indicating that some agent of plaintiff had personal knowledge of defendant's alleged debt, even though the debt was merely assigned to plaintiff and plaintiff did not have any personal knowledge as indicated.

12. Further, plaintiff failed to attach a copy of a contract to the petition showing any

liability of defendant, although it falsely alleged that it did so.

13. Plaintiff's petition was drafted in a manner, and with an intent, to deceive the court and defendant into believing that plaintiff had information sufficient to support a default judgment, whereas in fact plaintiff does not.

14. Plaintiff's violation of Sec. 1234, State Code is on-going, extensive and intentional, and exhibits an evil motive or reckless indifference to the rights of defendant, as well as to consumers generally.

15. Plaintiff's actions constitute a pattern and practice of unlawful and oppressive misconduct, which is deliberately misleading the defendants and courts regarding the validity of plaintiff's petitions.

16. As a result of plaintiff's violation of sec. 1234 State Code, defendant suffered a loss of money or property in that defendant incurred attorney's fees, various expenses, loss of time and work, and emotional embarrassment and suffering, and anxiety, over the bringing of plaintiff's lawsuit.

Wherefore, defendant prays this honorable Court to enter a judgment against plaintiff awarding defendant actual and punitive damages, attorney's fees for the amount of time reasonably expended in pursuit of this claim, for consequential and incidental damages, costs of suit, and for such other and further relief as this court deems appropriate in all the circumstances.

COUNT II - FDCPA VIOLATION

17. Defendant realleges and incorporates as if fully set forth herein paragraphs 1-16 of this Counterclaim.

18. Debt Collector is a debt collector within the scope and meaning of the FDCPA.

19. The petition and affidavit are means (as defined by the FDCPA, sec. 1692e) used by plaintiff to collect a debt allegedly owed by defendant, and further are "communications" as defined by the FDCPA, 1692a(2).

20. In its attempt to collect an alleged debt from defendant, Debt Collector violated the Fair Debt Collection Practices Act in the following ways:

a. By falsely, deceptively or misleadingly stating or implying that it was the actual creditor, rather than merely an assignee of a debt. [By not including the statement that the debt had been assigned to it]

b. By falsely, deceptively or misleadingly implying or suggesting that its agent had actual knowledge of the facts supporting plaintiff's petition. [referring to the custom of some plaintiffs to include an affidavit claiming that the debt was "true and

correct” or fair or accurate.]

c. By falsely, deceptively and misleadingly pleading that the amount of money being sought was “justly due and owing” when such information was outside the knowledge of any agent of plaintiff.

d. By attempting to collect compound interest when such was not allowed by the contract attached to plaintiff’s petition. [by seeking “interest” on the entire amount supposedly due, which already included interest]

e. By falsely, deceptively or misleadingly stating that the “contract” attached to its petition had any relationship to defendant, whereas in fact the document attached is not a contract at all and has no relation to defendant. [referring to the custom of some debt collectors to attach “form” contracts to the petition along with a claim that they were contracts entered by defendants.]

f. By attempting to collect interest on attorney fees. [by seeking interest as of a certain date on an amount which included attorney’s fees]

g. By attempting to collect attorney fees that have not, on information and belief, been actually expended, or which have no reasonable basis for being charged.

h. By attaching an affidavit containing false or misleading statements.

i. By attaching an affidavit misleadingly implying that the affiant possessed actual knowledge of the debt involved in this litigation.

j. By attaching an affidavit to the petition served upon the court, but not providing such document to defendant. [referring to an attempt by some debt collectors to provide information to the court without serving it upon the defendant. Incidentally, this is also an “ex parte” communication, and unfair as a breach of civil procedure]

k. By filing an unsubstantiated petition in violation of 15 U.S.C. sec. 1692d and 1692e.

21. As a direct and proximate result of plaintiff’s violation of the FDCPA, defendant has suffered emotional distress, inconvenience, embarrassment, humiliation and pain and suffering, as well as financial costs incident to defending the suit brought against him. Wherefore, defendant prays this honorable court to enter a judgment against plaintiff awarding defendant actual and statutory damages, reasonable attorney’s fees, costs of suit, and for such further and additional relief as this court deems just in all the circumstances.

Respectfully submitted,

Joe Consumer

Your address

Your City, State zip

(Your) phone number

Your email address

CERTIFICATE OF SERVICE

The undersigned certifies that he has served upon plaintiff a copy of the foregoing document by first class mail, postage prepaid, to Name and Address of lawyer representing Debt Collector, on this ___ day of _____, 20__.
