

Sample Motion to Vacate

IN THE SUPERIOR COURT OF THE STATE OF [your state]
IN 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 _____, 20xx. 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!). [If you don't have a very good reason, and the petition filed against you contains either a notice that "this is an attempt to collect a debt..." or a right to verify the debt, and you tried to verify the debt instead of filing an Answer, I suggest something like sample motion 2]
- 2(alternative). Defendant did not file a responsive pleading because plaintiff misled him into believing that plaintiff had original records or a special connection to the debt which for which it was suing defendant. Instead, plaintiff's petition was misleading and deceptive, and designed to trick defendants into failing to respond. Defendant's Proposed Answer includes a counterclaim under the Fair Debt Collection Practices Act for this violation of the law.
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 (or "asks the court to take judicial notice of its files") showing that the money allegedly owed is not supported by any evidence presented by plaintiff.

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)