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Research Guide – Motion to Set Aside Default When Service of Summons Did not Result in Actual Notice to Defendant

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Disclaimer

The information in this research guide is intended to assist patrons with their legal research and is in no way intended to replace the counsel of an Attorney. Any decisions about how to proceed must be determined by the patron. The library staff can recommend and refer you to print and web-based resources that will help you find answers to your law-related questions. The staff at the Law Library for San Bernardino County cannot explain or interpret the law itself and we are not permitted to give legal advice.

I received a default judgment against me but I did not know about it, is there anything I can do?

Under certain circumstances, you may be able to file a Motion to Set Aside Default Judgment on the grounds that you were not served. (To understand what a motion is, please review our guide: [What is a Motion?](#))

Where do I get the forms to file the Motion to Set Aside Default?

Motions are custom forms that you create/draft yourself on pleading paper.

So how do I draft a motion?

Motions include several parts:

1. The application or motion typically called a “Notice of Motion” (This tells the court what you want to do);
2. A Memorandum of Points and Authorities (The law that allows the court to grant your application/motion);
3. A Declaration (This is your statement of facts, a chance to tell your story);
4. An Order for the Judge to sign if he grants your application/motion.

Is there an example I can use to help me draft this motion?

A sample of what this type of Motion might look like is provided below. But you will have to decide whether the sample is the correct form for your situation. You may need to modify the form so it fits your case. Blank Pleading paper is available at <http://www.sblawlibrary.org/forms.html>

What do I do after I draft my forms?

Once you have drafted the forms to your specifications, you can file them with the court. Typically, the clerk will assign a hearing date for your application/motion. You will most likely need to serve the other party involved and file a **Proof of Service**. Some courts will serve the papers for you.

For information about service of papers and proof of service, please refer to one of the following research guides:

- *Personal Service of Court Papers*, published by the Sacramento County Public Law Library, <http://www.saclaw.org/Uploads/files/Step-by-Step/PersonalService.pdf>
- *Proof of Service by Mail*, published by the Sacramento County Public Law Library, <http://www.saclaw.org/pages/pos-mail.aspx>
- Proof of Service Forms, <http://courts.ca.gov/forms.htm?filter=POS>

For additional information, please review the following resources at the law library:

California Civil Procedure Before Trial 4th ed., vol. 2, ch. 38, Relief From Default or Default Judgment, §§ 38.75 - 38.109, Forms §§ 38.114 - 38.117.

California Forms of Pleading & Practice, vol 43, ch. 489, Relief from Judgments, Matthew Bender.

California Forms of Pleading & Practice, vol. 33, ch. 372, Motions & Orders, Matthew Bender. (Use this for ex parte applications when it is necessary to stay execution of a judgment or recall a writ of possession before your full motion to vacate default judgment can be heard.)

California Points & Authorities, vol. 7, ch.70, Defaults, Default Judgments, and Relief from Judgments and Orders, Matthew Bender. (includes sample forms)

Motion to Vacate a Default Judgment or Set Aside a Dismissal, [San Diego Law Library, https://sandiegolawlibrary.org/wp-content/uploads/wpmc-trash/2013/04/Motion_to_Vacate_a_Default_Judgment.pdf](https://sandiegolawlibrary.org/wp-content/uploads/wpmc-trash/2013/04/Motion_to_Vacate_a_Default_Judgment.pdf)

Can I stop the execution of the Judgment?

In some situations, you can file for a claim of exemption. The list of exemptions can be located online: <http://courts.ca.gov/documents/ej155.pdf>. Sacramento County Law Library also provides a list of exemptions at <http://www.saclaw.org/pages/exemptions.aspx>

Sacramento County Law Library has also provided the following guide: **Stop or Reduce a Wage Garnishment Step by Step**: <http://www.saclaw.org/pages/claim-exemption.aspx> (or as a PDF) <http://www.saclaw.org/uploads/files/Step-by-Step/SbS-claim-exemption.pdf>

Judicial Council Forms for Exemption Claims:

Claim of Exemption: [EJ – 160](#), Financial Statement: [EJ – 165/WG – 007](#),

Notice of Hearing on Claim of Exemption: [EJ – 175/WG-010](#).

Wage Garnishment Claim of Exemption:

Claim of Exemption Wage Garnishment: [WG – 006](#), Financial Statement: [WG – 007](#),

Notice of Filing of Claim of Exemption: [WG – 008](#), Notice of Hearing: [WG - 010](#),

Order Determining Claim of Exemption: [WG – 011](#),

Notice of Termination or Modification of Earnings Withholding Order: [WG - 012](#).

See all WG Forms at: <http://courts.ca.gov/forms.htm?filter=WG>

Please note that the following is a sample form, you will have to decide if this form will work your particular situation. You will have to modify and draft the sample form to your specifications. Filing this form does not guarantee that your motion will be heard or granted. If you need legal advice please seek the assistance of a licensed attorney.

*Defendant in **Pro Per** is a person who handles his/her case without an attorney. It is typical for you to alert the court of your **Pro Per** status on pleadings you file with the court.

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Defendant in Pro Per

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO

_____,
Plaintiff,
vs.
_____,
Defendant.

) Case No.: _____
) NOTICE OF MOTION AND MOTION FOR
) ORDER SETTING ASIDE AND
) VACATING DEFAULT [AND DEFAULT
) JUDGMENT] AND GRANTING
) DEFENDANT LEAVE TO DEFEND, AND
) SUPPORTING DECLARATION
) Date: _____
) Time: _____
) Dept: _____

NOTICE OF MOTION TO SET ASIDE DEFAULT JUDGMENT WHEN SERVICE DID NOT RESULT IN ACTUAL NOTICE TO DEFENDANT

To plaintiff _____ [name] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [date], at _____ [time], or as soon thereafter as the matter may be heard, in _____ (Department or Division) _____ of this court, located at _____ [street address], _____ [city], defendant will, and hereby does, move for an order setting aside and vacating the default [and default judgment] entered against defendant on _____ [date] and granting defendant leave to defend the action. The motion will be made on the ground that the service of summons in this case did not result in actual notice to the defendant in time to defend.

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1 **DECLARATION OF _____ [name] IN SUPPORT OF MOTION**
2 **FOR ORDER SETTING ASIDE AND VACATING DEFAULT [AND DEFAULT**
3 **JUDGMENT] AND GRANTING DEFENDANT LEAVE TO DEFEND**

4
5 I, _____ [name], declare:

- 6 1. I am the defendant in the above-entitled matter.
7 2. I did not receive service of summons on the date claimed by the defendant.
8 3. I did not receive service of summons at any other date.

9 *[State or list any other reasons or facts that might explain or demonstrate why you did not*
10 *receive service of summons]*

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24 I declare under penalty of perjury under the laws of the State of California that the foregoing is
25 true and correct.

26 Dated: _____

Respectfully Submitted,

27 By: _____

28 Defendant in Pro Per

1 THE COURT SHOULD GRANT DEFENDANT'S MOTION UNDER CODE OF CIVIL
2 PROCEDURE SECTION 473.5 FOR RELIEF FROM THE DEFAULT AND DEFAULT
3 JUDGMENT BECAUSE HE/SHE RECEIVED NO ACTUAL NOTICE OF THE
4 ACTION IN TIME TO DEFEND, HE/SHE FILED A TIMELY MOTION FOR RELIEF,
5 AND THE DEFAULT AND DEFAULT JUDGMENT WERE NOT CAUSED BY
6 DEFENDANT'S AVOIDANCE OF SERVICE OR INEXCUSABLE NEGLECT.
7

8 **A. Motion for Relief from Default for Lack of Actual Notice**

9 When service of a summons has not resulted in actual notice to a party in time to defend the
10 action and a default or default judgment has been entered against him or her in the action, the
11 party may serve and file a notice of motion to set aside the default or default judgment and for
12 leave to defend the action (Code Civ. Proc. § 473.5(a)).
13

14 **B. Court May Grant Relief on Timely Motion if Defendant Not at Fault**

15 On a finding by the court that the motion was made within the period permitted by Code of
16 Civil Procedure Section 473.5(a) and that his or her lack of actual notice in time to defend the
17 action was not caused by his or her avoidance of service or inexcusable neglect, it may set aside
18 the default or default judgment on whatever terms as may be just and allow the party to defend
19 the action (Code Civ. Proc. § 473.5(c); Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d
20 886, 890-891, 151 Cal. Rptr. 258).
21

22 **C. Granting of Relief within Discretion of Trial Court**

23 Whether or not relief should be granted under Code of Civil Procedure Section 473.5 is a matter
24 within the discretion of the trial court (Brockman v. Wagenbach (1957) 152 Cal. App. 2d 603,
25 611, 313 P.2d 659).
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1 **D. Policy Favors Application for Relief**

2 Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails over the
3 general rule of deference to the trial court's exercise of discretion, and doubts are resolved in
4 favor of the application for relief from default (Tunis v. Barrow (1986) 184 Cal. App. 3d 1069,
5 1079, 229 Cal. Rptr. 389).
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10 Dated: _____.

Respectfully Submitted,

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13 By: _____
14 Defendant in Pro Per
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Defendant in Pro Per

IN THE SAN BERNARDINO SUPERIOR COURT

STATE OF CALIFORNIA

) Case No.: _____

)
) ORDER

Plaintiff,

vs.

_____,
Defendant.

ORDER OF COURT

The motion of _____ [defendant] for an order _____ setting
aside and vacating the default judgment heretofore entered came on regularly for hearing by the
court on _____ [date]. Plaintiff appeared by counsel _____
[name]; defendant appeared in pro per.

The court, having considered the evidence presented at the hearing and the declarations
submitted in support of and in opposition to the motion finds as follows:

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1. The service of the summons did not result in actual notice to the defendant in time to defend;
2. The motion for relief was timely filed; and
3. The defendant's lack of actual notice in time to defend the action was not caused by his/her avoidance of service or inexcusable neglect.

IT IS, THEREFORE, ORDERED that the default judgment heretofore entered in this action against defendant _____ [*name*] be, and hereby is/are vacated and set aside and defendant is granted leave to file his/her proposed answer and to defend the action.

Dated: _____.

Judge of the Superior Court