

## Instructions for Filing a Motion to Set Aside a Default

Use these forms if all of the following are true:

- You are the defendant in a foreclosure action.
- **You did not file an Answer and Default HAS** entered against you.
- **Final judgment** has NOT entered against you.

Consult the Glossary of “Foreclosure: A Self-Help Guide to Saving Your Home” if you need an explanation of these terms.

### **Step 1: Overview**

A motion is a request to the court asking the court to do something specific. In this motion, you are asking the court to set aside the default that entered against you when you did not answer the complaint on time. You are asking the court for a chance to file an Answer and fight the foreclosure. You must show two things: (1) that you have “good cause” for the default to be set aside (i.e., you were not served with the complaint or you have a defense to the foreclosure); and (2) that you did not fail to answer for a “contumacious” (bad faith) purpose. This sample motion focuses on two common defenses: that (1) the plaintiff did not comply with the Fair Foreclosure Act; and/or (2) the plaintiff did not allege or prove that it is a proper party with the right to foreclose (“standing”). There are other defenses to foreclosure described in more detail in “Foreclosure: A Self-Help Guide to Saving Your Home” that you can add on the lines provided in the certification.

A motion must be made in writing. A motion must have all of these forms:

- A **Notice of Motion** – this form lets the court and your adversary know that you are filing a motion, what you are asking the court to do, the date, time and location when the court will decide the motion;
- A **Certification** – this is your statement (which you certify to be truthful) in which you tell the court all of the facts that the court needs to have in order to make a decision about your motion;
- A **Memorandum of Law** – this form makes legal arguments that apply to your motion;
- **Certification of Service** – this is your statement (which you certify to be truthful) that you sent the plaintiff a copy of your motion
- **Order** – this is a blank form for the judge to fill out with the decision on your motion

The court requires you to pay a filing fee of \$135.00 if this is the first pleading you are filing in this case. It should be in the form of a check or money order payable to “Treasurer, State of New Jersey.” If you cannot afford to pay the filing fee, complete a “Filing Fee Waiver Request.” A sample can be found on the New Jersey Judiciary’s website at

[http://www.judiciary.state.nj.us/civil/forms/11208\\_filingfeewaivreq.pdf](http://www.judiciary.state.nj.us/civil/forms/11208_filingfeewaivreq.pdf).

You must also prepare the **Answer** and Case Information Statement that you will file if the Court grants your motion. A sample Answer and instructions for completing it can be found at Appendix D of “Foreclosure: A Self-Help Guide to Saving Your Home.”

### **Step 2: Check the status of the Foreclosure action**

Start by making sure that default has entered but that final judgment has not entered. You can review the “docket” for your court file online at <http://njcourts.judiciary.state.nj.us/web1/ACMSPA/>. The “docket” is a list of pleadings that have been filed in your case. You will be able to see the list online, but you will not be able to view the actual documents online. It is easiest to find your case if you have your docket number, which is the number on your foreclosure complaint beginning with “F.” You can also find your case by your name alone. If you discover either that default has NOT been entered in your case yet or that final judgment HAS been filed, do not file this motion to set aside the default, but do not wait. Look in “Foreclosure: A Self-Help Guide to Saving Your Home” and find the pleading that is appropriate for your stage of the case.

### **Step 3: Research your loan**

In a foreclosure action, the plaintiff is claiming that it has the right to collect the debt and foreclose the mortgage. In order to prove it has those rights, the note must have been physically transferred to the plaintiff, and the mortgage must have been “assigned” to the plaintiff in writing. This is called “standing,” and is explained in more detail in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home,” and in the Memorandum of Law that is part of this motion package.

Sometimes you can find information about who has rights to your loan on the Internet. Two government agencies that sometimes own loans are Fannie Mae and Freddie Mac. Both agencies have websites where you can search for your loan. There is also a company known as MERS (Mortgage Electronic Registration System) that maintains information about some loans. Check these websites for information about your loan. Print out the results of your searches. You will use this information for your certification.

Fannie Mae: <http://www.fanniemae.com/loanlookup>

Freddie Mac: <https://ww3.freddiemac.com/corporate>

MERS: <https://www.mers-servicerid.org/sis/>

### **Step 4: Complete the forms**

- 1. For all five forms, fill in the top (“caption”).**
  - The five forms are: Notice of Motion, Certification, Memorandum of Law, Proof of Mailing, and an Order.

- Fill in your name, address and telephone number.
- Copy the name of the plaintiff from the foreclosure complaint.
- Copy the name of the defendant from the foreclosure complaint.
- Insert the name of the County.
- Copy the Docket Number from the Foreclosure Complaint.

## 2. Complete the Notice of Motion

This tells the plaintiffs and the court that you are asking the court to set aside the default and to allow you to file a late Answer.

- A. Fill in the date that the court will decide the motion. The court has a schedule of dates when motions are decided. You can find the schedule on the court's website at <http://www.judiciary.state.nj.us/calendars.htm> (look for "motion day schedule"). Motions are almost always decided on Fridays. Choose a date about three weeks after you will be filing and serving your motion – you must give your adversary at least 16 days advance notice of your motion.
- B. Fill in the county and address of the court that will decide the motion. You can find the addresses and phone numbers of each county's court here: <http://www.judiciary.state.nj.us/njcourts-10.htm> Be sure to put down the address of the "Chancery Division" of the court. Call the court if you do not know the address.
- C. Decide whether you want to request oral argument and check the appropriate box. If you request oral argument, you are asking the court for the chance to tell the court in person why the entry of default should be set aside. Otherwise, the court will decide the motion "on the papers," meaning that its decision will be based only on the papers that you and the plaintiff file with the court, and you will not have an opportunity to appear in court to explain why the entry of default should be set aside. Oral argument is not helpful unless you feel very confident making the legal arguments described in the brief. Whether or not you ask for oral argument, the court will decide whether or not to give you the chance to appear in person and tell your story, or whether to decide your motion based only on the papers.
- D. Sign, date and print your name at the bottom of the Notice of Motion.

## 3. Complete the Answer and Case Information Statement

You are too late to file an Answer without a court order allowing you to do so, but you need to show the court the Answer you will file if the court grants your motion. Follow the instructions for completing these documents from Appendix D to "Foreclosure: A Self-Help Guide to Saving

Your Home” (Instructions for Filing an Answer with Defenses and Counterclaims). You will attach a copy of the Answer and Case Information Statement to your Certification as Exhibit E.

#### **4. Complete the Certification**

This is your statement to the Court of the facts of the case. Read this form carefully, and cross out any paragraphs that do not apply to you. Remember that you are certifying that all of the statements you make in this form are true.

Paragraph 3: Paragraph 3 of the Certification asks you to explain whether you were served with the foreclosure complaint, and what you did when you received it.

In order for the court to have entered default, the plaintiff gave the court proof that you were served with the foreclosure complaint. Sometimes, the proof is the affidavit of a process server. Sometimes, it is a certification by an attorney. You can get a copy of the proofs the plaintiff filed with the court at the courthouse. If the proofs submitted to the court by the plaintiff are not accurate and you were not served with the complaint, check the first line. In that event, explain how you found out that a foreclosure complaint had been filed (for example, if you saw something in the newspaper or if you were speaking with the mortgage servicer and someone told you). Also explain how you got a copy of the complaint (for example, if you went to the courthouse and requested a copy).

If you were served with the complaint, check the second line and explain what you did when you received the complaint. It is important to show that you did not fail to answer out of contempt for the court, or for some improper purpose such as to get a delay. For example, if you tried to get a lawyer but could not, write out all of the steps that you took to try to get a lawyer. If you did not understand that the papers you received required a written answer, say so and explain how you found out that you had to file a written answer. If you were confused because of something the loan servicer told you, write those details in the space provided in paragraph 3 of the certification. Provide as much detail as possible.

Paragraph 5: Paragraph 5 of the Certification asks you to explain how the plaintiff failed to comply with the Fair Foreclosure Act.

The Plaintiff is legally required by the Fair Foreclosure Act to send you a Notice of Intention to Foreclose, and must do so before it has the right to foreclose. The Fair Foreclosure Act and the requirements of the Notice of Intention to Foreclose are described in detail in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home” (Law That Can Protect You From Foreclosure). Note that the law requires the plaintiff to *send* the notice to you by certified mail. Even if you do not sign for the certified mail and never receive it, the plaintiff has fulfilled its legal obligation by sending you the notice. The plaintiff is not required to file a copy of the Notice of Intention to Foreclose with the court, and therefore you probably will not find a copy in your court file.

If you did not receive a Notice of Intention to Foreclose and you did not refuse any certified mail, check the first line.

If you did receive a Notice of Intention to Foreclose, use the checklist in Chapter 2 of “Foreclosure: A Self-Help Guide to Saving Your Home” to figure out if the notice you received is missing any required information. For example, the Notice of Intention to Foreclose might identify the loan servicer but it might be missing the name of the plaintiff, or it might identify the servicer as the holder of the loan even though that it is not true.

Paragraph 7: Paragraph 7 concerns the plaintiff’s standing to bring the foreclosure action. If the plaintiff is not the original lender, check the first line.

Next, carefully review the foreclosure complaint. The plaintiff must allege facts to show that it is either a “holder” of the note, or a non-holder in possession of the note with the right to enforce it.

To show that it is a holder, the plaintiff must show two things: (1) the plaintiff had physical possession of the note at the time the complaint was filed; and (2) the note is indorsed (signed over) to the plaintiff. If the Complaint does not allege these facts, check the appropriate boxes.

To show that it is a non-holder in possession of the note Note with the right to enforce it, the plaintiff must prove facts that show: (1) the plaintiff has physical possession of the Note; (2) who is the actual holder of the Note; (3) the actual holder gave the plaintiff the right to enforce the note (for example, if there is a contract between the holder and the plaintiff that allows the plaintiff to enforce the note); (3) the dates when these things happened was before the complaint was filed. If the complaint does not allege these facts, check the appropriate boxes.

Paragraph 8: Paragraph 8 asks you to tell the court if you have information that suggests that someone other than the plaintiff owns your loan. In this section, fill in the blanks with the information you got when checked the Fannie Mae, Freddie Mac, and MERS websites. If you searched a site but it did not show the name of the owner of your loan, leave the line blank or cross it out.

## **5. Attach your Exhibits to your Certification**

Your Exhibits should be:

Exhibit A: The foreclosure complaint

Exhibit B: The Notice of Intention to Foreclose

Exhibit C: Printouts of your internet research from Fannie Mae, Freddie Mac and MERS websites

Exhibit D: The Answer you will file if the court grants your motion.

Put a blank piece of paper in between the Exhibits so it's easy to tell which Exhibit is which. Write the letter of the Exhibit on that blank paper.

**6. Read and sign the Memorandum of Defendant in Support of Defendant's Motion to Vacate Judgment Pursuant to R. 4:50-1**

This form is a letter to the judge making a legal argument why the Court should vacate the judgment that entered against you.

**7. Complete the Order**

The only part of the order you must fill out is the caption. Do not complete any other part of the order. The rest of the order will be completed by the judge.

**8. Complete the Proof of Mailing**

**9. Make three copies of everything**

You will send the originals to the court, along with one copy. You will send the second copy to the lawyer for the plaintiff. Keep the third copy for yourself.

**Step 4: File the motion**

You must file the entire motion (the notice of motion, the certification (with all Exhibits attached, including your Answer and Case Information Statement), the memorandum of law, the proof of service and the order) with the court in the county where the property is located, along with either your \$135.00 filing fee or your motion to proceed without fees. A sample cover letter is provided. Use it to tell the court what you are filing, and also as a checklist to make sure that you have everything you need. You can file in person or by mail. If you do so in person, bring a second copy of the motion with you and ask the clerk to stamp your copy "filed." Save this copy for your records. If you do so by mail, include a second copy and an envelope with enough postage so that the court can mail you a copy stamped "filed" for your records. This is your proof that you have filed a motion. Include another self-addressed, stamped envelope so that the court can send you a copy of the judge's order when it is signed.

**Step 5: Serve the motion**

At the same time that you file the motion, you must also deliver a copy of the entire motion (an exact copy of everything you filed) to the plaintiff's attorney. You can send the motion to the plaintiff's attorney by regular mail. Make sure that you do so more than 16 days before the hearing date.

**Step 6: Appear in court on the hearing date**

If the court grants oral argument, you will be notified by mail or by telephone. In that event, you must appear in court on the hearing date. When your case is called, you will be sworn in. You will have a chance to speak to the judge and explain why the judgment

should be vacated. You must be prepared to explain why the court should vacate the judgment – i.e., what is deficient or false regarding the papers filed with the court and why you did not answer sooner and what is your defense to the foreclosure. The plaintiff will have a chance to speak (usually through its attorney) and explain why the final judgment should not be vacated. The judge will usually make a decision on your motion that same day. The judge is supposed to say the reasons for the decision aloud and give you a written order with the court's decision.

**Step 7: Understand the Court's Order**

If your motion is “granted,” you were successful. The court is allowing you to file an answer and fight the foreclosure. If your motion was “denied,” the court did not excuse your lateness and did not give you permission to file an answer and fight the foreclosure.

If you are in court on the day the court decides the motion, ask the clerk to give you a copy of the court's order before you leave. Otherwise, if you sent in a self-addressed stamped envelope, a copy of the court's order will be mailed to you.

If you are successful:

Make two copies of the Order. File your Answer with the Court clerk along with a copy of the order and any filing fee required. Send the second copy to the plaintiff's lawyer along with the Answer you are filing. You must do this within 7 days of the date you receive the order.

It is a good idea to try to get a lawyer to represent you for the rest of the case. If you cannot, instructions for representing yourself can be found in “Foreclosure: A Self Help Guide to Saving Your Home.”

If you are not successful:

**IF YOU ARE UNSUCCESSFUL, CALL LEGAL SERVICES AT 1-888-LSNJ-LAW (1-888-576-5529).** Even if Legal Services of New Jersey could not represent you on your motion to set aside default, we may be able to help you with an appeal. If you cannot get an attorney, instructions for filing an appeal on your own can be found here:

[http://www.judiciary.state.nj.us/appdiv/forms/10837\\_appl\\_prose\\_kit.pdf](http://www.judiciary.state.nj.us/appdiv/forms/10837_appl_prose_kit.pdf). An appeal must be filed within 45 days of the date final judgment enters. You should receive notice in the mail when the plaintiff files papers requesting entry of final judgment. The property cannot be sold at sheriff's sale until after entry of final judgment. At that point, note that filing an appeal will not stop a sheriff's sale. You must ask the trial court for a “stay pending appeal.” If the trial court denies the stay pending appeal, you must apply to the Appellate Division for the stay. If a stay is not granted, the sheriff's sale can take place during the appeal.