

UNLAWFUL DETAINER

Ex Parte Application for Stay of Execution + Ex Parte Motion to Set Aside Default Judgment



Two-Part Forms

Self-Help Legal Access Centers

Santa Monica

1725 Main St.,
Room 210
Santa Monica, CA 90401

Inglewood

1 East Regent St.,
Room 107
Inglewood, CA 90301

Torrance

825 Maple Ave.,
Room 160
Torrance, CA 90503

Long Beach

275 Magnolia Ave.,
Room 3101
Long Beach, CA 90802

Feb. 2023

This guide and/or form(s) is/are designed to help you fill out the forms yourself. It is not intended to provide legal advice or strategy as to how to complete the case. The information provided in this packet only presents options and examples. This is not a substitute for professional legal advice from an attorney.

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**Please refer
to a How-
To-Guide.**

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

_____,
Plaintiff(s),
vs.
_____,
Defendant(s)

Case No.: _____

**EX PARTE APPLICATION FOR ORDER
STAYING EXECUTION OF THE
JUDGMENT UNTIL A HEARING ON
DEFENDANT'S MOTION TO SET ASIDE
JUDGMENT (DEFAULT AND WRIT,
ALSO, IF ANY) AND AN ORDER
SHORTENING TIME FOR HEARING
AND SERVICE OF THE MOTION TO
SET ASIDE; MEMORANDUM OF
POINTS AND AUTHORITIES AND
DECLARATION IN SUPPORT THEREOF**

ASSIGNED JUDGE: _____
DEPARTMENT: _____
HEARING DATE: _____
TIME: _____

TO PLAINTIFF, AND TO PLAINTIFF'S COUNSEL OF RECORD, IF ANY,
Defendant(s) _____, request(s) an Order Staying
Execution of the Judgment until a hearing on his/her Motion to Set Aside the Default, Vacate the
Judgment, and Recall the Writ of Execution, if any, and an Order Shortening Time for Service of
and Hearing on the Motion to Set Aside. This Application is made on the ground that without a

1 stay, Defendant(s) will suffer irreparable harm by being evicted and Defendant's Motion to Set
2 Aside will be moot.

3 This Ex Parte Application is based on Defendant's Declaration of Ex Parte Notice,
4 Memorandum of Points and Authorities, Supporting Declaration(s) and upon all papers on file in
5 this action.
6

7 Dated: _____

Signed by: _____
Defendant(s) without Attorney

9 _____
10 Print Name

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 A court of general jurisdiction has a statutory as well as an inherent duty and power to
3 control its own processes and orders so as to make them conform to justice, including the
4 granting of a stay of execution. Code of Civil Procedure Section states in pertinent part: “(a)
5 Every Court shall have power: . . . (8) To amend and control its processes and orders so as to
6 make them conform to law and justice.” CCP §128(a). This was confirmed in *Revolution*
7 *Eyewear, Inc. v. Aspex Eyewear, Inc. (2009), 2009 U.S. LEXIS 64749*, wherein the court stated
8 that “The district court has the inherent power to control and manage its docket, which includes
9 the authority to order a stay pending the outcome of reexamination proceedings.” *Id at 9*.
10
11

12 Here, the court has authority to grant a stay to enable Defendant(s) sufficient time to
13 present and argue the underlying Motion to Set Aside the Default, Vacate the Judgment, and
14 Recall the Writ of Execution. If the stay is not granted, Defendant(s) will be locked out without
15 an opportunity to present the motion. As the attached Motion shows, Defendant should have the
16 right to have this eviction case heard on its merits. Therefore, the stay should be granted.
17
18

19 Dated: _____

Signed by: _____

Defendant(s) without Attorney

21 _____
22 Print Name

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DECLARATION OF EX PARTE NOTICE

I, _____, DECLARE as follows:

1. I am over the age 18 years, and I have personal knowledge of the facts stated in this declaration. If called to testify thereto, I could and would do so truthfully.
2. I gave the following notice of this Ex Parte Application for a Stay of Execution of Judgment Pending a Motion to Set Aside the Default:

“My name is: _____.

I am calling to give notice that I am going to the _____ Court on ___/___/___ at ___:___ a.m. / p.m. in Department ___ of the Los Angeles Superior Court, located at _____

_____ to request an Ex Parte Application for a Stay of Execution of the Judgment Pending a Motion to Set Aside and an Order Shortening Time for Hearing and Service of a Motion to Set Aside in the Case of _____

vs. _____, Case Number: _____.

I can be reached at this telephone number: _____

3. I gave this ex parte notice in the manner set forth on the following page:

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A. I gave the notice set forth above on this date and time: ___/___/___ at ___:___ a.m. /p.m. to:

___ the Plaintiff’s attorney,
___ a person at the Plaintiff’s attorney’s office, or
___ the Plaintiff (the landlord without an attorney)

That person’s name and telephone number are: _____

_____. When I gave the notice he/she responded:

“ _____ ”

B. I gave the notice set forth above by leaving a voicemail message on this date and time: ___/___/___ at ___:___ a.m. / p.m. because no one answered the call or my call was directed to voicemail. The person I called is ___ Plaintiff’s attorney or

___ the Plaintiff (the landlord without an attorney) named

_____ at

() - .

C. I gave the notice by 10:00 a.m. on the day before the hearing date for the stay as required by CAL.R.CT.3.1203(a).

D. This is an eviction action and I gave notice later 10:00 a.m. on or after the court day before the hearing date for the stay as allowed by CAL.R.CT. 3.1203(b) when notice is reasonable. The notice given here was reasonable because:

I have personally seen the Sheriff’s Notice to Vacate and I will be locked out on ___/___/____. I could not give the notice any earlier because: _____

_____.

Other _____.

I could not give the notice any earlier because: _____

_____.

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1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct to the best of my knowledge. Executed this date ____/____/____ in
3 the City of _____, California.

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5 Signed By: _____
6 Defendant(s) without Attorney

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4. If this Stay is granted, I believe I can win both my Motion to Set Aside and trial because I have valid defenses.

See my Proposed Answer filed with this Application.

5. I understand that I may be required to pay the rent for each day the stay is in effect.

6. I ask the Court to enter an order shortening time for service and hearing on my Motion to Set Aside to resolve this issue quickly to avoid any prejudice to Plaintiff if the Stay is granted.

7. If the Stay of Execution is not granted before and until my Motion is heard, I will suffer harm because: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed on this date of ____/____/____, in the City of _____, California

Signed by: _____
Defendant(s) without an Attorney

Printed Name

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

_____,
Plaintiff(s),

vs.

_____,
Defendant(s)

Case No.: _____

**[PROPOSED] ORDER ON EX PARTE
APPLICATION FOR ORDER STAYING
EXECUTION OF THE JUDGMENT
UNTIL A HEARING ON DEFENDANT'S
MOTION TO SET ASIDE AND FOR AN
ORDER SHORTENING TIME FOR
HEARING AND SERVICE OF THE
MOTION TO SET ASIDE**

ASSIGNED JUDGE: _____
DEPARTMENT: _____
HEARING DATE: _____
TIME: _____

After consideration of Defendant's Ex Parte Application, all other pleadings and papers, and oral argument, if any, in this case, and upon good cause appearing, the Court orders:

Defendant's Ex Parte Application for Order Staying Execution of the Judgment and Order Shortening time for Hearing and Service of Defendant's Motion to Set Aside is granted. Execution of the Judgment is stayed up to and including the following date:

____/____/____.

The Defendant's Motion to Set Aside is calendared for hearing before this Court on

____/____/____.

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Defendant is ordered to serve the Stay Application and Order and the Motion to Set
Aside by mail or by personal service to Plaintiff or his/her attorney of record by:
____/____/____.

Any Opposition by Plaintiff or his/her attorney of record is to be served to Defendant by
 mail or by personal service by: ____/____/____.

Other: _____

Dated: _____

Commissioner/Judge of the Superior Court

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

)
) Case No.: _____

Plaintiff(s),

vs.

Defendant(s).

) **NOTICE OF MOTION AND MOTION TO
SET ASIDE THE JUDGMENT AND ANY
DEFAULT, AND TO QUASH ANY WRIT
OF POSSESSION/EXECUTION. [CCP
§§ 473(b), 473.5, 473(d), 128(a)(8), 86(b)(3)-
(if a limited civil case)].**
) **ASSIGNED JUDGE:** _____
) **DEPARTMENT:** _____
) **HEARING DATE:** _____
) **TIME:** _____
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TO PLAINTIFF AND PLAINTIFF'S ATTORNEY OF RECORD, IF ANY:

NOTICE IS HEREBY GIVEN THAT on ____/____/____**20** at ____:____**am / pm** , in
Dept. _____ of the above-mentioned Court, located at, _____,
California, Defendant will and hereby does move the Court to set aside the Judgment entered in
this case, as well as any Default, and to quash any Writ of Possession and/or Execution.

//

CHECK ALL THAT APPLY BELOW:

This Court should grant the relief requested based upon the following grounds and legal authority because the Judgment and any Default was/were:

- entered due to Defendant's surprise, mistake, excusable neglect or inadvertence.
[CCP §473(b)]; and/or,
- entered despite the Defendant's lack of actual notice of the lawsuit in time to respond.
[CCP §473.5]; and/or,
- void since the legal papers were not served on Defendant at all or were improperly served. [CCP §473(d)]; and/or,
- void since they were based (in whole or in part) on external fraud or mistake.
[CCP §§ 128(a)(8), CCP 86(b)(3) (in limited civil cases)]
- invalid/void, therefore any Writ of Possession/Execution used to enforce the Judgment was improperly issued. [CCP §§ 128(a)(8), 86(b)(3) (in limited civil cases)]

This motion is based on this Notice of Motion and the Motion to Set Aside Judgment, the Memorandum of Points and Authorities, the Defendant's Declaration, the pleadings and papers on file and upon such other matters presented to the court at the hearing.

Date: _____

Signed by: _____

Defendant without Attorney

Print Name

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Defendant in Pro Per

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF LOS ANGELES**

11 _____

12 Plaintiff(s),

13 vs.

16 _____

17 Defendant(s).

Case No.: _____

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION TO SET ASIDE THE
JUDGMENT AND ANY DEFAULT, AND
TO QUASH ANY WRIT OF
POSSESSION/EXECUTION. [CCP
§§ 473(b), 473.5, 473(d), 128(a)(8), and
86(b)(3)-(if a limited civil case)].**

ASSIGNED JUDGE: _____

DEPARTMENT: _____

HEARING DATE: _____

TIME: _____

20 **I. THE COURT MAY SET ASIDE A JUDGMENT PURSUANT TO CCP § 473(b)**
21 **WHEN ENTERED AGAINST A DEFENDANT DUE TO HIS/HER MISTAKE,**
22 **INADVERTENCE, SURPRISE OR EXCUSABLE NEGLIGENCE**

23 California's Code of Civil Procedure § 473(b) states:

24 The court may, upon any terms as may be just, relieve a party . . . from a
25 judgment . . . taken against him or her through his or her mistake,
26 inadvertence, surprise, or excusable neglect. Application for this relief . . .
27 shall be made within a reasonable time, in no case exceeding six months.

28 CCP § 473(b) is a remedial statute and should be liberally construed to carry out the
policy of permitting trials on their merits. *See Faasuyi v. Permatex, Inc.* (2008) 167

1 Cal.App.4th 681, 695 quoting *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d. 352
2 (internal citations and quotations omitted). Absent prejudice to the Plaintiff and diligence by the
3 Defendant, only “very slight” evidence is needed to set aside a default. *Id.* The standard is if
4 the act or omission is one that a reasonably prudent person would commit under the same
5 circumstances. *See Transit Ads, Inc. v. Tanner Motor Livery, Ltd.* (1969) 270 Cal.App.2d 275,
6 279. Fraud by a third party, physical incapacity or death in the family can cause excusable
7 neglect. *See Shapiro v. Clark* (2008) 164 Cal.App.4th 1128; *see also Gamet v. Blanchard* (2001)
8 91 Cal.App.4th 1276 and *Sullivan v. Sullivan* (1967) 246 Cal.App.2d 301.

10 **II. THE COURT MAY SET ASIDE A DEFAULT AND DEFAULT JUDGMENT**
11 **UNDER CCP § 473.5 WHEN PROPER SERVICE DOES NOT RESULT IN**
12 **ACTUAL NOTICE IN TIME TO DEFEND THE LAWSUIT**

13 California Code of Civil Procedure § 473.5 states:

14 (a) When service of a summons has not resulted in actual notice to a party in time to
15 defend an action . . . [Defendant] may serve and file a notice of motion to set aside the
16 default . . . within a reasonable time, but in no event exceeding the earlier of: (i) two
17 years after entry of a default judgment . . . (ii) 180 days after service on him or her of a
18 written notice that the default or default judgment has been entered.

19 (b) A notice of motion to set aside a default . . . shall be accompanied by an affidavit
20 showing . . . that the party's lack of actual notice . . . was not caused by his or her
21 avoidance of service or inexcusable neglect.

22 Cal. Civ. Proc. § 473.5. The purpose of this law is to allow cases to be decided by trials on
23 their merits. *Id.* The Defendant has not received “actual notice” unless he/she has personally
24 received or personally viewed the Summons and Complaint by one of the service methods
25 specified under Code of Civil Procedure sections 415.10 et. seq. *See Tunis v. Barrow* (1986)
26 184 Cal.App.3d 1069, 1077.

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1 **III. THE COURT MUST SET ASIDE A JUDGMENT PURSUANT TO CCP § 473(d)**
2 **AND THE COURT'S EQUITABLE POWERS UNDER CCP § § 128(a)(8) and**
3 **86(b)(3) WHEN IT IS VOID FOR LACK OF JURISDICTION.**

4 If legal papers are not served in strict compliance with Code of Civil Procedure sections
5 415.10 et. seq., a judgment is void as the Court lacks jurisdiction. *See Ellard v. Conway* (2001)
6 94 Cal.App.4th 540; *see also Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th
7 1228, 1239. One may file to set aside a judgment that appears void on its face by a review of the
8 judgment roll at anytime. *See Cal. Civ. Proc. §§ 473(d), 128(a)(8), 86(b)(3); see also Hayashi v.*
9 *Lorenz* (1957) 42 Cal.2d 848, 851. However, one must file to set aside a judgment within the
10 two year limit specified under Cal. Civ. Proc. § 473.5 if the judgment appears valid on its face
11 but is void for lack of jurisdiction. *Rogers v. Silverman* (1989) 216 Cal.App.3d 1114, 1121-1122.

12 **IV. THE COURT MAY SET ASIDE A JUDGMENT AT ANYTIME USING ITS**
13 **EQUITABLE POWERS UNDER CCP § § 128(a)(8), 86(b)(3) WHEN A**
14 **JUDGMENT IS ENTERED BASED ON EXTRINSIC FRAUD AND/OR**
15 **MISTAKE, AND, IN LIMITED CIVIL CASES, INADVERTENCE AND/OR**
16 **EXCUSABLE NEGLECT**

17 The Court has inherent equitable powers to set aside a judgment obtained by extrinsic
18 fraud and/or mistake to ensure its orders conform to justice. *See Cal. Civ. Proc. §§ 128(a)(8).* In
19 limited civil cases, the Court may also consider inadvertence and excusable neglect. *See Cal.*
20 *Civ. Proc. §§ 86(b)(3).* Such fraud and/or mistake includes most external circumstances
21 depriving a party of a fair trial, such as the other party filing a false proof of service. *In re*
22 *Marriage of Park* (1980) 27 Cal.3d 337, 342; *see also Sullivan, supra*, 256 Cal.App.2d 304.

23 In default cases, there is a 3-part test for relief; whether there is/was: 1) a meritorious
24 case--do the facts, if proven, create a possible different result (not required if not required if
25 improper or lack of service); 2) a valid reason for not defending the original case; and, 3)
26 diligence (ordinary care in the situation) used in requesting to set aside the default once
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1 discovered. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975; *see also Shapiro v. Clark* (2008) 164
2 Cal.App.4th 1128, 1144; *see also McCreadie v. Arques* (1967) 248 Cal.App.2d 39, 46. The
3 Court also considers any possible prejudice that could result from the set aside. *Munoz v. Lopez*,
4 (1969) 275 Cal.App.2d 178, 183.

5 **V. CONCLUSION**

6
7 The Court should set aside the default and judgment and quash any writ of possession
8 and/or execution in the interest of due process and fairness. Defendant should be able to
9 properly defend the case and have it decided by a trial on its merits.
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12 Date: _____

Signed by: _____

Defendant without Attorney

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

Case No.: _____

DECLARATION OF DEFENDANT

Plaintiff(s),

vs.

**IN SUPPORT OF MOTION TO SET
ASIDE THE JUDGMENT AND ANY
DEFAULT, AND TO QUASH ANY WRIT
OF POSSESSION/EXECUTION. [CCP
§§ 473(b), 473(d), 473.5, 128(a)(8), and
86b(3)-(if a limited civil case)].**

Defendant(s).

ASSIGNED JUDGE: _____
DEPARTMENT: _____
HEARING DATE: _____
TIME: _____

I, _____ declare as follows:

I am the defendant in the above-entitled action.

2. I did not answer the Summons and Complaint and/or did not go to the trial because:

CHECK ANY STATEMENTS BELOW THAT APPLY:

I did not receive the Summons and Complaint in this case at all or did not receive them in the legally required way. _____

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I did not receive the Summons and Complaint in time to file an answer on time:

The Plaintiff, his/her attorney, or someone else lied, misled me or otherwise caused me to not file papers and/or attend the trial: _____

I did not receive a Notice of the Trial from the Court: _____

I was very sick/hospitalized which prevented me from filing my answer or going to court: _____

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Other: _____

3. I did not avoid service of the legal papers or do anything else that interfered with notice of the Summons and Complaint that was meant for me.

4. I discovered there was a default/judgment against me on: _____
When I found out, I filed this Motion to Set Aside within a reasonable time and within the statutory period, if applicable.

5. If this Motion is granted, I believe I can win the case at trial.

6. If the Court does not grant this motion, it would be unfair and cause me harm because:

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7. If this is an eviction case, I request the Court give me additional time to find new housing so that I will not be homeless.

I declare under penalty under the laws of the State of California, that the foregoing is true and correct. Executed at: _____, California on date: _____.

Signed by: _____
Defendant without Attorney

Printed Name

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Defendant in Pro Per

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

Plaintiff(s),

vs.

Defendant(s).

)
) Case No.: _____
)
) **[PROPOSED] ORDER**
)
) **ASSIGNED JUDGE:** _____
) **DEPARTMENT:** _____
) **HEARING DATE:** _____
) **TIME:** _____
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After consideration of Defendant's motion, all other pleadings and papers, and any oral argument in this case, and upon good cause appearing, the Court orders Defendant's Motion to Set Aside be granted. The Judgment entered in this case, as well as any Default, is set aside. The Court also orders that any Writ of Possession and/or Execution issued is recalled and quashed.

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- Defendant's Proposed Answer is deemed filed as of this date.
- Defendant is ordered to file an Answer within _____ days from the date of this Order.
- Other: _____

_____.

It is so Ordered.

Date: _____

JUDGE OF THE SUPERIOR COURT