

Chapter 2

DISMISSAL FOR LACK OF PROSECUTION; DEFAULT AND DEFAULT JUDGMENT

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PART I: STRATEGY**§ 2.01 Scope**

This chapter addresses the following tasks:

- Understanding the requirements for dismissal for lack of prosecution.
- Recognizing how to avoid dismissal for lack of prosecution.
- Recognizing the requirements for entry of default.
- Following the procedures and practices for entry of default.
- Following the procedures and practices pertaining to entry of a final judgment by default.

Following the procedures and practices pertaining to the setting aside of an entry of default and judgment by default.

§ 2.02 Objective and Strategy

The purpose of this chapter is to address the requirements for administrative dismissal of an action for lack of prosecution, entry of default and entry of final judgment by default, and the procedures for setting aside a default and default judgment.

Initially, the chapter focuses on administrative dismissals. Often in cases involving multiple defendants, the practitioner may have difficulty in serving one of the defendants. In such a situation, plaintiff's attorney frequently may receive a court notice that the matter is scheduled for a dismissal for lack of prosecution. Even in single-party cases, service on a defendant may be problematic within the time period established by the court for an administrative dismissal. Therefore, it is important for the practitioner to understand those requirements and avoid an unnecessary and costly process that could trigger a statute of limitations bar.

The focus of the chapter then shifts to the situation where defendants have been served but have not answered. At that point, it becomes important for the practitioner to understand the requirements for entry of default and a judgment by default. By understanding these requirements, a practitioner can bring the matter quickly and efficiently to conclusion for the client's benefit. This process is especially important in those situations

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where it is unlikely that the defendant will ever seek to participate in the matter.

This chapter concludes with the requirements for vacating a judgment by default and what defendants' counsel need to know to succeed in setting a judgment aside.

**PART II: SEEKING OR AVOIDING DISMISSAL OF ACTION
FOR LACK OF PROSECUTION**

**§ 2.03 CHECKLIST: Seeking or Avoiding Dismissal of Action for
Lack of Prosecution**

- ☐ Review applicable statutes and rules: N.J. Ct. R. 1:13-7, 4:23-5(a), 4:43-2.
 - ☐ Identify time deadlines for service of process, entering defaults and obtaining default judgments.
 - ☐ Identify substantive requirements to be met for service of process, entering defaults and obtaining default judgments.
- ☐ Avoid dismissal for lack of prosecution in cases other than those in Special Civil Part by taking one of following actions within four months of filing complaint:
 - ☐ File proof of service or acknowledgment of service.
 - ☐ Enter default.
 - ☐ Enter default judgment.
 - ☐ File motion within 120 days of suppression order with respect to defendant whose answer was suppressed for failure to provide discovery.

Authority: N.J. Ct. R. 1:13-7, 4:23-5(a), 4:43-2.

Discussion: *See §§ 2.04, 2.05 below.*

- ☐ Avoid dismissal for lack of prosecution, or reinstate action, in cases pending in Special Civil Part by taking one of following actions:
 - ☐ Serve process within 60 days of filing complaint.
 - ☐ Serve summons and complaint within one year of date of dismissal in order to obtain automatic restoration.
 - ☐ Move for restoration more than one year after dismissal for lack of prosecution.
 - Submit affidavits showing good cause for delay in effecting service.
 - Submit proof of due diligence in attempting to serve summons and complaint

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Authority: N.J. Ct. R. 1:13-7(d).

Forms: Form CLP 2.203.01, Special Civil Part Ex Parte Application to Vacate Administrative Dismissal of Complaint

Form CLP 2.203.02, Letter to Special Civil Part Clerk for Filing Ex Parte Application to Vacate Administrative Dismissal of Complaint

Form CLP 2.203.03, Certification in Support of Ex Parte Application to Vacate Administrative Dismissal of Complaint in Special Civil Part

Discussion: *See § 2.07 below.*

- ☐ Respond to court notice of dismissal by taking one of following actions within 60 days of receiving notice:
 - ☐ Serve defendant with process, and then file proof of service or acknowledgment of service with court clerk.
 - ☐ Convert default into default judgment.
 - ☐ Enter default judgment (*see § 2.11 below*, CHECKLIST: Entering Final Judgment by Default).
 - ☐ File motion with court establishing service on defendant cannot be made with due diligence.

Authority: N.J. Ct. R. 1:13-7(b), 4:23-5(a)(1), 4:43-2.

Discussion: *See § 2.06 below.*

- ☐ Seek reinstatement of action dismissed for lack of prosecution without prejudice.
 - ☐ Reinstate action on consent:
 - Obtain consent order from adverse parties in action.
 - Submit consent order to court clerk.
 - Submit answer, case information statement and requisite fee.
 - ☐ Serve summons and complaint on defendant if basis of administrative dismissal was failure to serve process.

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- Move for reinstatement of dismissed action on showing of good cause.
- Commence new action in appropriate circumstances.

Authority: N.J. Ct. R. 1:13-7(a); *Stanley v. Great Gorge Country Club*, 353 N.J. Super. 475, 485–486, 803 A.2d 181 (Law Div. 2002); *Mason v. Nabisco Brands*, 233 N.J. Super. 263, 558 A.2d 851 (App. Div. 1989); .

Forms: Form CLP 2.203.04, Certification in Support of Motion to Vacate Order of Dismissal

Form CLP 2.203.05, Certification of Service of Notice of Motion to Vacate Dismissal of Complaint

Form CLP 2.203.06, Notice of Motion to Vacate Order Dismissing Complaint Without Prejudice

Form CLP 2.203.07, Order Vacating Dismissal and Permitting Defendant to File Answer

Form CLP 2.203.08, Consent Order Vacating Dismissal and Permitting Defendant to File an Answer

Form CLP 2.203.09, Special Civil Part Ex Parte Order Vacating Order of Dismissal of Complaint

Form CLP 2.203.10, Letter to Special Civil Part Clerk for Filing Proof of Service of Complaint

Discussion: *See* § 2.06 *below*.

§ 2.04 Recognizing when and how Court Will Dismiss for Lack of Prosecution

[1] Understanding Basis for Court Rules Regarding Diligent Prosecution of Action

The courts are understandably averse to seeing their calendars and dockets clogged with pending cases that are not being diligently prosecuted. Were it not for court rules pertaining to lack of prosecution, a case could theoretically remain pending indefinitely without any action being taken to move the case toward final judgment. Dismissal for lack of prosecution is, therefore, a court-generated process whereby actions may

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be dismissed, without prejudice, when plaintiff fails timely to serve process, enter a default, or obtain a default judgment.

The primary court rule concerning dismissal for lack of prosecution is N.J. Ct. R. 1:13-7. Although N.J. Ct. R. 1:13-7 is not limited to cases in which plaintiffs fail to serve process, dismissal for lack of prosecution most often results from plaintiff's failure to serve the defendant following the filing of the complaint. *Rivera v. Atlantic Coast Rehabilitation & Health Care Ctr.*, 321 N.J. Super. 340, 729 A.2d 42 (App. Div. 1999) (where multiple defendants are named in action, and some have been served while others have not, rule should apply to allow dismissal as against those defendants who have not been served, while not affecting continuation of action as to defendants who have been served and have answered).

[2] Applying Two-step Process for Dismissing Actions Not Diligently Prosecuted

The current court rule (N.J. Ct. R. 1:13-7), having been revised by amendments effective in 2004, sets forth the circumstances under which dismissal will result from failure to prosecute. N.J. Ct. R. 1:13-7 replaces the former dismissal calendar, which proved to be ineffective.

N.J. Ct. R. 1:13-7 delineates a two-step process, pursuant to which, upon plaintiff's failure to file proof or acknowledgement of service of process on defendant within four months after commencement of the action, the court will issue a written notice to the plaintiff, requiring that proof be filed within 60 days, or the action will be dismissed without prejudice. The rule applies not only to the failure to file proof of service at the outset of the action, but also to subsequent four-month periods of inactivity, in which an answer is not filed, or a default or default judgment is not entered. In each of these instances, the plaintiff is notified that the action will be dismissed without prejudice if the inaction is not remedied within 60 days. N.J. Ct. R. 1:13-7.

In the event plaintiff fails to take measures necessary to avoid dismissal, the court will dismiss the action without prejudice. Plaintiff may then seek reinstatement of the original complaint or commence an entirely new action. For discussion of the requirements for restoration and the considerations pertaining to the choice between restoration of the dismissed action or the commencement of a new action, *see* § 2.06[4] *below*.

Even if the complaint is administratively dismissed and subsequently restored without defendant's knowledge, the defendant later may move

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pursuant to N.J. Ct. R. 4:37-2(a) to dismiss the action without prejudice based on plaintiff's failure to serve the summons and complaint within the requisite 15-day period. On such a motion, the defendant must establish more than a mere delay in issuing the summons, because mere delay, without more, generally will not warrant an order dismissing the complaint. A court will also consider other factors such as:

1. The existence of prejudice or lack of prejudice to the defendant;
2. Whether or not defendant was aware of the existence of the claim; and
3. Whether good cause existed for the failure to serve timely the complaint, or whether the delay was attributable to plaintiff's neglect.

For example, in a medical malpractice action, the complaint was administratively dismissed and subsequently restored to active status based on the representation of plaintiff's counsel that counsel had delayed in serving the complaint because he could not obtain an Affidavit of Merit (*see* NJS 2A:53A-26 *et seq.*). After service was effectuated, the defendants moved to dismiss the action based on plaintiff's failure to comply with N.J. Ct. R. 4:4-1. The court held that, even in the absence of a showing of prejudice by the defendants, the plaintiff's delay in serving a summons and complaint constituted an improper attempt to circumvent the Affidavit of Merit statute and warranted dismissal without prejudice. *Czepas v. Schenk*, 362 N.J. Super. 216, 827 A.2d 1080 (App. Div. 2003) (although dismissal was without prejudice to commencement of new action, defendants were free to assert defense of statute of limitations in subsequent action).

Exception: N.J. Ct. R. 1:13-7 does not apply in receivership and liquidation proceedings, or in condemnation and foreclosure actions governed by N.J. Ct. R. 4:64-8.

§ 2.05 Identifying what Constitutes Required Proceeding for Avoidance of Dismissal

Certain "required proceedings" identified in N.J. Ct. R. 1:13-7(b) must be taken within a four-month period in order to avoid the issuance of a court-generated dismissal notice for lack of prosecution. These required proceedings are defined as:

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1. Filing of proof of service or acknowledgment of service;
2. Filing of an answer;
3. Entry of a default; or
4. Entry of a default judgment.

Thus, a dismissal for failure to prosecute may result from failure to effectuate timely service, as well as, among other things, the failure timely to enter a default, or timely to enter a default judgment. The taking of a default is a prerequisite to the entry of a default judgment. *See* § 2.10 *below*.

● **Warning:** N.J. Ct. R. 1:13-7(b) specifically provides that, in multiple defendant cases, when at least one defendant has answered, a failure to timely convert a default into a default judgment will not result in the issuance of a notice of dismissal as to any of the defaulted defendants. It must be noted that this exception in multiple defendant cases specifically speaks to the conversion of a default into a default judgment, and does not refer to the entry of a default. Consequently, in multiple defendant cases, when one or more of the defendants fails to answer, plaintiff must seek to enter the default or face dismissal for lack of prosecution as to that defendant.

§ 2.06 Complying with Requirements for Avoiding Dismissal and Restoring Action Dismissed for Lack of Prosecution

[1] Taking Necessary Steps to Avoid Service of Court Notice

A dismissal for lack of prosecution may be avoided in the first instance if plaintiff takes the required steps before the initial notice is served. In the most basic terms, a plaintiff must serve the defendants and file proof of service within four months after commencing the action. If the defendant files an answer within the four-month time period, even if plaintiff fails to file proof of service, no court notice should be issued, and the plaintiff need not take further action to avoid the issuance of a court-generated dismissal notice. If the defendant should fail to answer the complaint despite service, plaintiff should not allow four months to lapse without entering a default. Similarly, if a default is entered in a single-defendant case, plaintiff should

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not allow an additional four-month period to lapse without obtaining a default judgment.

A primary concern in the adoption of present rule N.J. Ct. R. 1:13-7 was to promote prompt service of process. The rule does not, however, merely govern the first four months after the commencement of the action. The requirement of the rule that the plaintiff move the case forward is a continuing one, and the rule applies “whenever any civil action shall have been pending in any court for four months without a required proceeding having been taken.” The plaintiff who timely serves a defendant within the first four months of commencing the action, and who files proof of service with the court within that time frame, is not then relieved of the continuing burden of prosecuting the case to completion. For example, in the event the defendant defaults, if the plaintiff fails to seek the conversion of the default into a default judgment within four months after the entry of the default, the court will issue a dismissal notice for failure to prosecute. *See* N.J. Ct. R. 4:43-2(d).

In addition, if a defendant’s answer is stricken or suppressed for failure to provide discovery, the plaintiff must take the necessary steps to obtain a default judgment. If the plaintiff takes no action, the case may be dismissed on the basis of plaintiff’s failure to prosecute. *See* § 2.06[3] *below*.

[2] Responding to Court Notice

The failure of the plaintiff to take a required action within the requisite four-month period will trigger service by the court of a notice of dismissal upon the plaintiff. The plaintiff nevertheless has an additional 60 days following the date of the court notice to take required action to avoid dismissal. Those actions are set forth in N.J. Ct. R. 1:13-7(c) as:

1. Filing proof of service or acknowledgment of service (if the required action giving rise to the service of the notice in the first instance was the failure to serve the defendant);
2. Filing an answer or requesting a default (if the required action was failure to answer or failure to enter a default);
3. Obtaining a default judgment (if the required action was failure to obtain a default judgment); and
4. Filing of a motion by or with respect to the defendant who is noticed for dismissal.

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● **Timing:** In effect, the plaintiff has a six-month period in which to perform the required tasks, that is, four months prior to the issuance of a court notice, and 60 days thereafter.

✕ **Strategic Point:** N.J. Ct. R. 1:13-7 provides that an order of dismissal will not be entered if a motion is made by or with respect to the defendant noticed for dismissal. If the plaintiff is unable to effectuate service or take other required action, plaintiff should not merely ignore the notice. Rather, a motion should be made with respect to the particular defendant. For example, if the plaintiff is unable to effectuate service on the defendant, plaintiff should move to extend the time to make service, explaining to the court the circumstances that prevent the plaintiff from effectuating service. The making of the motion, if it is granted, will avoid the court's issuance of an order of dismissal.

[3] Taking Appropriate Steps when Defendant's Answer Has Been Suppressed

If defendant's answer is suppressed with prejudice for failure to provide discovery pursuant to N.J. Ct. R. 4:23-5(a), the clerk will automatically enter a default on the docket as to that defendant. *See* § 2.09 *below*. The plaintiff must then seek entry of a default judgment within 120 days from the date of the order of suppression. If the plaintiff fails to seek a default judgment within this 120-day period, the court will place the defendant on the dismissal list. N.J. Ct. R. 1:13-7(b). Plaintiff then risks dismissal of his or her action if a default judgment is not entered within 60 days. The necessary steps required to enter a default judgment are explained in §§ 2.12, 2.13 *below*.

[4] Restoring Action After Dismissal

If plaintiff fails to take the requisite action, either before or after service of the court notice, the action will be dismissed without prejudice. N.J. Ct. R. 1:13-7 provides two methods for restoring a dismissed action:

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1. Obtaining a consent order; or
2. Moving for reinstatement on motion demonstrating good cause.

The plaintiff may be able to persuade the defendant to consent to an order vacating the dismissal. A defendant may wish to avoid unnecessary motion practice if the delay is short and there is no prejudice to the defendant. If defendant's consent can be obtained, plaintiff should prepare a consent order to be signed by plaintiff's counsel, which permits defendant to file an answer. The consent order and the defendant's answer, together with a case information statement and the requisite fee, should then be filed with the clerk. N.J. Ct. R. 1:13-7(a).

Absent consent, the plaintiff must make a motion and demonstrate good cause. The standard for granting reinstatement or restoration is liberal. It has been held that reinstatement is to be freely granted, and in granting reinstatement, the client's freedom from fault and the absence of prejudice to the defendant are key factors to be considered. *See, e.g., Rivera v. Atlantic Coast Rehabilitation & Health Care Ctr.*, 321 N.J. Super. 340, 729 A.2d 42 (App. Div. 1999) (honest mistake by attorney in failing to calendar dismissal notice did not warrant denial of motion to restore).

Defendant, in opposing the motion to restore the action, or by way of motion to dismiss after issue is joined, may seek to dismiss the action on the ground that the failure to issue the summons within 15 days of the date of the Track Assignment Notice constituted a violation of N.J. Ct. R. 4:4-1. *See* § 2.04 *above*. However, dismissal is reserved for those situations where there is prejudice and no lesser sanctions will erase the prejudice suffered by the innocent defendant. *Olds v. Donnelly*, 150 N.J. 424, 438-439, 696 A.2d 633 (1997) (quoting *Crispin v. Volkswagenwerk*, 96 N.J. 336, 345, 476 A.2d 250 (1984), and noting that, generally, violation of rule requiring issuance of summons within 10 days of filing of complaint will not result in dismissal of action when defendant is not prejudiced, complaint appears meritorious and failure to make proper service is attributable solely to neglect of plaintiff's attorney). *See also Stanley v. Great Gorge Country Club*, 353 N.J. Super. 475, 803 A.2d 181 (Law Div. 2002) (prejudice was not demonstrated from delay in issuance of summons where plaintiff had filed incident report as to alleged slip and fall injury, and there was no evidence that passage of time had made investigation of facts difficult, or evidence harder to uncover).

If the statute of limitations expires after the original complaint is filed, and the complaint is dismissed for failure to prosecute, plaintiff must seek

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to reinstate the original complaint rather than file a new action. Reinstatement of a dismissed action under N.J. Ct. R. 1:13-7 relates back to the date of the filing of the complaint. If the original filing of the complaint was timely, the reinstated complaint is deemed to be timely, even if the statute of limitations expired after the original filing, and prior to the order reinstating the complaint. *Mason v. Nabisco Brands, Inc.*, 233 N.J. Super. 263, 558 A.2d 851 (App. Div. 1989) (interpreted rule so as to preclude claim from being barred by statute of limitations defense that would have been unavailable had complaint not been dismissed); *J. Roberts & Son, Inc. v. Hillcrest Mem. Co.*, 363 N.J. Super. 485, 833 A.2d 666 (App. Div. 2003) (N.J. Ct. R. 1:13-7 preclusion applies to reinstatement of original complaint, and not to filing of second complaint). On the other hand, if the motion to reinstate the dismissal is denied, the filing of a new complaint would be necessitated, and the defendants in the second action would be free to assert a statute of limitations defense.

⚠ Strategic Point: The defendant should carefully consider whether, under the facts of a particular case, a viable argument can be made that the defendant has been prejudiced by plaintiff's failure to issue a summons within the 15 days required by N.J. Ct. R. 4:4-1. Defendant should consider whether other circumstances exist, such as an attempt to circumvent statutory mandates, which would warrant an N.J. Ct. R. 4:4-1 dismissal. *See Czepas v. Schenk*, 362 N.J. Super. 216, 827 A.2d 1080 (App. Div. 2003) (medical malpractice action dismissed without prejudice based on plaintiff's intentional delay in serving complaint because plaintiff could not obtain Affidavit of Merit pursuant to NJS 2A:53A-26 *et seq.*). In addition, defendant, in opposing a motion to restore, should advance facts (if they exist) demonstrating that defendant has been prejudiced, and that restoration of the action should therefore be denied. Prejudice may be shown to exist when an opportunity to obtain a witness's statement, to investigate the facts, or to preserve evidence has been lost due to plaintiff's inordinate delay or inactivity.

Exception: In a divorce action, the date of reinstatement of the complaint may be deemed to relate back to the date of the filing of the

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motion for reinstatement, when that date is more appropriate for equitable distribution purposes. *Higgins v. Higgins*, 358 N.J. Super. 395, 817 A.2d 1030 (Ch. Div. 2002) (it was parties' attempt to reconcile that prompted dismissal of complaint pursuant to N.J. Ct. R. 1:13-7, and therefore parties did not believe marriage was over as of that date; it would be inappropriate for cut-off date for equitable distribution purposes to be original filing date).

● **Timing:** If the cause for the dismissal was the failure of plaintiff to effectuate service of process on the defendant, plaintiff should still make every effort to issue and serve process on the defendant and seek restoration within one year from the date of the dismissal. *See Stanley v. Great Gorge Country Club*, 353 N.J. Super. 475, 803 A.2d 181 (Law Div. 2002) (court adopted "bright-line test," holding that rebuttable presumption of good cause for restoration of action exists if restoration is sought within one year of administrative dismissal).

Forms: Form CLP 2.203.04, Certification in Support of Motion to Vacate Order of Dismissal

Form CLP 2.203.05, Certification of Service of Notice of Motion to Vacate Dismissal of Complaint

Form CLP 2.203.06, Notice of Motion to Vacate Order Dismissing Complaint Without Prejudice

Form CLP 2.203.07, Order Vacating Dismissal and Permitting Defendant to File Answer

Form CLP 2.203.08, Consent Order Vacating Dismissal and Permitting Defendant to File an Answer

Form CLP 2.203.09, Special Civil Part Ex Parte Order Vacating Order of Dismissal of Complaint

Form CLP 2.203.10, Letter to Special Civil Part Clerk for Filing Proof of Service of Complaint

[5] **Filing New Complaint**

The dismissal of a complaint for failure to prosecute under N.J. Ct. R.

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1:13-7 does not prevent a plaintiff from commencing a new action. The commencement of a new action does not require the plaintiff to demonstrate good cause, as would be required if the plaintiff were seeking to reinstate the original complaint. *J. Roberts & Son, Inc. v. Hillcrest Mem. Co.*, 363 N.J. Super. 485, 833 A.2d 666 (App. Div. 2003) (N.J. Ct. R. 1:13-7 preclusion applies to reinstatement of original complaint, and not to filing of second complaint). While plaintiff is relieved of the burden of demonstrating good cause which would be required to reinstate the original action, plaintiff must be certain that the second action is timely under the applicable statute of limitations.

⚡ Strategic Point: In the event the plaintiff commences a new action, the defendant may raise the defense of the statute of limitations in the new action. The limitation period will be calculated based on the filing date of the new action. If the limitation period expires after the filing of the first complaint, plaintiff's only viable alternative is to seek restoration of the first action. *See Rivera v. Prudential Property & Cas. Ins. Co.*, 104 N.J. 32, 514 A.2d 1296 (1986) (second action time barred absent evidence of defendant's wrongful, misleading or dilatory conduct).

§ 2.07 Complying with Administrative Dismissal Requirements in Special Civil Part

In Law Division cases there are a number of actions which, if not taken within the time specified, will result in a dismissal for lack of prosecution. In Special Civil Part cases, the action is subject to dismissal for lack of prosecution only if process has not been served within 60 days after the date of the filing of the complaint. If process is not served within the 60-day time period, the clerk will dismiss the complaint without prejudice and notify the plaintiff. If the complaint and summons are served within one year from the date of dismissal, restoration is "automatic"; no motion or court order is required. N.J. Ct. R. 1:13-7(d).

Beyond the one-year period following the filing of the complaint, a dismissed case may be restored only by way of motion demonstrating good cause for the delay in making service, and due diligence in attempting to serve the summons and complaint. N.J. Ct. R. 1:13-7(d).

✘ **Strategic Point:** A defendant served beyond the one-year period for “automatic” restoration must consider whether the plaintiff demonstrated good cause and due diligence. Defendant may be able to prevent the plaintiff from restoring the action if facts exist indicating that defendant could have been readily located and served within the requisite one-year period, and that plaintiff’s failure to effectuate service was the result of inexcusable neglect.

● **Warning:** The granting of an order to restore the case after expiration of one year following dismissal does not foreclose the defendant from raising the defense of the statute of limitations.

Forms: Form CLP 2.203.01, Special Civil Part Ex Parte Application to Vacate Administrative Dismissal of Complaint

Form CLP 2.203.02, Letter to Special Civil Part Clerk for Filing Ex Parte Application to Vacate Administrative Dismissal of Complaint

Form CLP 2.203.03, Certification in Support of Ex Parte Application to Vacate Administrative Dismissal of Complaint in Special Civil Part

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PART III: SECURING ENTRY OF DEFAULT

§ 2.08 CHECKLIST: Securing Entry of Default

- ☐ Review applicable statutes and rules: N.J. Ct. R. 4:43-1.
 - ☐ Identify time deadlines.
 - ☐ Identify requirement of obtaining default before default judgment may be secured.
- ☐ Obtain automatic entry of default for defendant's failure to provide discovery, or for failure to appear in Special Civil Part, and meet following requirements:
 - ☐ Obtain order striking answer without prejudice.
 - ☐ Obtain order striking answer with prejudice if defendant does not move to vacate order striking answer within 90 days.
 - ☐ Orally request entry of default with Clerk of Court by exhibiting order striking answer.
 - ☐ In Special Civil Part, obtain automatic entry of default if party fails to appear or defend.

Authority: N.J. Ct. R. 4:43-1, 6:6-2; *Douglas v. Harris*, 35 N.J. 270, 173 A.2d 1 (1961); *Fox v. Fox*, 76 N.J. Super. 600, 185 A.2d 230 (Ch. Div. 1962).

Forms: Form CLP 2.208.01, Request for Entry of Default by Special Civil Part Clerk

Form CLP 2.208.06, Certification in Support of Plaintiff's Request for Entry of Default Judgment in Special Civil Part

Discussion: See §§ 2.09, 2.10[4] *below*.

- ☐ Obtain entry of default within six months of expiration of time to respond by filing with Clerk of Court following documents:
 - ☐ Written request for entry of default.
 - ☐ Supporting affidavit showing:
 - Facts surrounding service of summons and complaint.
 - Date of service as shown in return of process.

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- Expiration of time to respond.
- Serve copy of default order on defendant by ordinary mail.

Authority: N.J. Ct. R. 4:43-1; *Dynasty Bldg. Corp. v. Ackerman*, 376 N.J. Super. 280, 870 A.2d 629 (App. Div. 2005).

Forms: Form CLP 2.208.02, Request for Entry of Default
Form CLP 2.208.03, Letter to Clerk for Filing Request for Entry of Default

Form CLP 2.208.04, Certification in Support of Plaintiff's Request for Entry of Default Judgment

Form CLP 2.208.05, Certification of Non-Military Service in Support of Request for Entry of Default Judgment

Discussion: See § 2.10 below.

- ☐ Move for entry of default if more than six months have elapsed from expiration of time to respond.
- Prepare notice of motion and supporting affidavit, showing:
 - Facts surrounding service of summons and complaint.
 - Date of service as shown in return of process.
 - Expiration of time to respond.
- Serve motion on defendant and file with court.
- Serve copy of default order on defendant by ordinary mail.

Authority: N.J. Ct. R. 1:6, 4:43-1.

Forms: Form CLP 2.208.07, Notice of Motion to Enter Default Judgment

Form CLP 2.208.08, Special Civil Part Notice of Motion to Enter Default Judgment

Form CLP 2.208.09, Letter to Special Civil Part Clerk for Filing Notice of Motion to Enter Default Judgment

Form CLP 2.208.10, Letter to Clerk for Filing Proof of Service of Notice of Motion to Enter Default Judgment

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Form CLP 2.208.11, Special Civil Part Proof of Mailing of
Notice of Motion to Enter Default Judgment

Discussion: *See § 2.10 below.*

§ 2.09 Obtaining Automatic Entry of Default by Clerk of Court Where Answer Has Been Stricken

If the defendant's answer is stricken with prejudice based on the defendant's failure to provide discovery, the plaintiff may exhibit a copy of the order to the clerk, who will then enter the default. The clerk will enter the default only if the order provides that the answer is stricken or suppressed with prejudice.

An order striking the answer without prejudice cannot serve as a predicate for the entry of a default against the defendant. This is evident from N.J. Ct. R. 4:23-5, which establishes a two-tier system for the eventual entry of a default. Under the procedures established by N.J. Ct. R. 4:23-5, plaintiff must move on notice for an order dismissing or suppressing the answer of a defendant who fails to provide discovery. The defendant may avoid sanctions by providing the discovery prior to the return date of the motion, and so advising the court. If defendant fails to provide the required discovery, the court will enter an order of dismissal without prejudice. Defendant may still avoid dismissal with prejudice by:

1. Providing the required discovery;
2. Moving to vacate the suppression order prior to the entry of an order striking the answer with prejudice; and
3. Paying a restoration fee (\$100 within 30 days of the entry of the order of dismissal; \$300 thereafter; more than 90 days after entry of the initial order of dismissal, the court may also award sanctions and counsel fees).

N.J. Ct. R. 4:23-5(a)(1).

If the defendant has not taken action within 90 days following the entry of the initial suppression order, plaintiff may move for dismissal or suppression with prejudice. The motion will be granted unless defendant cross-moves to vacate the initial order of suppression and either provides the required discovery, or demonstrates exceptional circumstances why the discovery was not and could not be provided. N.J. Ct. R. 4:23-5(a)(2).

N.J. Ct. R. 4:43-1 takes the two-tier procedure into account by

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specifically requiring the answer to be stricken with prejudice before a default may automatically be entered by the clerk.

● **Timing:** The plaintiff must seek entry of a default judgment within 120 days from the date of the order of suppression with prejudice, or risk dismissal for failure to prosecute. If the plaintiff fails to seek a default judgment within this 120-day period, the court will place the defendant on the dismissal list. Plaintiff then risks dismissal of his or her action if a default judgment is not entered within 60 days thereafter. N.J. Ct. R. 1:13-7. *See* § 2.06[3] *above*.

§ 2.10 **Requesting Entry of Default for Failure to Plead or Otherwise Defend Action**

[1] **Requesting Entry of Default Within Six Months of Actual Default**

Unless the answer is stricken with prejudice, in which event the plaintiff can seek the clerk's automatic entry of the default, the plaintiff must make a formal written request for the entry of the default, which must be filed within six months of the actual default. N.J. Ct. R. 4:43-1.

The written request for the entry of default must be accompanied by the attorney's affidavit, which must include:

1. A recitation of the facts relating to the service of process and a copy of the complaint on each defendant;
2. The date of service as reflected in the return of the process; and
3. A statement affirming that the time to answer or move as to the complaint, counterclaim, cross-claim or third-party complaint has expired and has not been extended.

Forms: Form CLP 2.208.02, Request for Entry of Default

Form CLP 2.208.03, Letter to Clerk for Filing Request for Entry of Default

Form CLP 2.208.04, Certification in Support of Plaintiff's Request For Entry of Default Judgment

Form CLP 2.208.05, Certification of Non-Military Service in Support

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of Request for Entry of Default Judgment

Form CLP 2.208.06, Certification in Support of Plaintiff's Request for Entry of Default Judgment in Special Civil Part

Form CLP 2.208.07, Notice of Motion to enter Default Judgment

Form CLP 2.208.08, Special Civil Part Notice of Motion to Enter Default Judgment

Form CLP 2.208.09, Letter to Special Civil Part Clerk for Filing Notice of Motion to Enter Default Judgment

Form CLP 2.208.10, Letter to Clerk for Filing Proof of Service of Notice of Motion to Enter Default Judgment

Form CLP 2.208.11, Special Civil Part Proof of Mailing of Notice of Motion to Enter Default Judgment

[2] Bringing Motion After Six Months from Date of Default

A plaintiff who waits longer than six months to seek entry of a default may not enter the default by making a request to the clerk, but is required to make a motion in accordance with N.J. Ct. R. 1:6-1 *et seq.*, which must be filed and then served on the defaulting party. N.J. Ct. R. 4:43-1.

[3] Serving Copy of Entry of Default

A plaintiff obtaining a default against a defendant who was served with process either personally, or by certified or ordinary mail, must serve on the defendant a copy of the default after it is entered. N.J. Ct. R. 4:43-1. Service is to be made by ordinary mail, at the same address where original process was served. No time limitation is set forth in the rule establishing when service of a copy of the default must be effectuated, nor does the rule impose any penalty or set forth any remedy for failure to serve notice of the entry of default. N.J. Ct. R. 4:43-1.

Failure to serve a copy of the default does not render a subsequent default judgment void under N.J. Ct. R. 4:50-1(d). The failure to provide the notice required by the last sentence in N.J. Ct. R. 4:43-1 is properly considered, however, in determining whether sufficient excusable neglect was established to permit relief from the judgment under N.J. Ct. R. 4:50-1(a), should the defaulting party seek to vacate the judgment. A lack of knowledge of the entry of the default on the part of the defaulting party may warrant relief, whereas a lack of prejudice resulting from the failure

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to give the requisite notice will not justify setting aside the default. *See Dynasty Bldg. Corp. v. Ackerman*, 376 N.J. Super. 280, 870 A.2d 629 (App. Div. 2005) (when plaintiff failed to serve notice required by N.J. Ct. R. 4:43-1, default judgment was entered 30 days after entry of default, and defendant moved to vacate judgment and dismiss complaint 24 days later, defendant clearly knew of entry of default, and failure to give notice of entry of default did not mandate relief from default judgment pursuant to N.J. Ct. R. 4:50-1(d) on ground that judgment was void).

However, these issues may be moot where default judgment is entered by the court because notice to the defaulting party is required. N.J. Ct. R. 4:43-2(b).

[4] Entering Default in Special Civil Part

If a party fails to appear or defend the action, or fails to appear for trial, or if the answer is stricken, the clerk shall enter the party's default. Within 30 days of the entry of the default, if the default resulted from a failure to plead or enter an appearance, the defaulting party may file a written application with the consent of the adversary, together with a responsive pleading, in which case the clerk must automatically remove the default. N.J. Ct. R. 6:6-2.

Forms: Form CLP 2.208.01, Request for Entry of Default by Special Civil Part Clerk

Form CLP 2.208.06, Certification in Support of Plaintiff's Request for Entry of Default Judgment in Special Civil Part

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PART IV: ENTERING FINAL JUDGMENT BY DEFAULT**§ 2.11 CHECKLIST: Entering Final Judgment by Default**

- ☐ In cases other than Special Civil Part cases, or uncontested foreclosure actions, obtain judgment on default.
 - ☐ Determine whether judgment may be entered by clerk or by court.
 - ☐ Request that clerk enter judgment if claim is for sum certain.
 - Prepare affidavit of particulars of claim.
 - Attach copy of note or other evidence of indebtedness.
 - ☐ If claim is not for sum certain, or if Clerk is not authorized to enter judgment, such as when defendant is minor or incompetent, apply to Court for entry of judgment.
 - Serve notice of motion on defendant.
 - Serve notice of proof hearing on defendant.
 - ☐ Investigate and file non-military affidavit.
 - Investigate defendant's military status by obtaining evidentiary facts.
 - Obtain statement from Department of Defense.
 - Prepare affidavit stating defendant is not in military service; or alternatively, prepare affidavit that military status cannot be ascertained, and post bond; or alternatively, prepare affidavit that defendant is in active military service
 - ☐ Conform judgment to pleadings and serve executed copy of judgment on defendant

Authority: N.J. Ct. R. 4:43-2(a), (b); New Jersey Soldiers' and Sailors' Civil Relief Act, NJS 38:23C-1–38:23C26; Federal Soldiers' and Sailors' Civil Act of 1940, 50 USCS Appx § 501 *et seq.*; N.J. Ct. R. 1:5-7; *Bernhardt v. Alden Café*, 374 N.J. Super. 271, 864 A.2d 421 (App. Div. 2005); *PNC Bank, N.A. v. Kemenash*, 335 N.J. Super. 124, 761 A.2d 118 (App. Div. 2000).

Forms: Form CLP 2.211.01, Affidavit of Proof and Non-

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Military Service

Form CLP 2.211.02, Proposed Order of Final Judgment by Default

Form CLP 2.211.03, Letter to Clerk for Filing Certification in Support of Proof of Service

Form CLP 2.211.04, Letter to All Parties Forwarding Copy of Default Judgment

Form CLP 2.211.05, Certification of Service of Notice of Motion to Enter Final Judgment by Default

Form CLP 2.211.06, Certification in Support of Plaintiff's Motion for Entry of Final Judgment by Default

Discussion: *See § 2.12 below.*

- ☐ In cases pending in Special Civil Part, obtain default judgment:
 - ☐ Determine whether judgment may be entered by clerk or by court.
 - ☐ Apply to clerk for money judgment:
 - Prepare and file affidavit of proof
 - File attorney's certification for legal fees
 - Attach copy of note or other evidence of indebtedness.
 - ☐ Apply to clerk for judgment in landlord-tenant actions within 30 days of entry of default:
 - Prepare and file landlord's affidavit.
 - Prepare and file attorney's certification.
 - ☐ Apply to court for default judgment in landlord-tenant actions if 30-day period from entry of default has expired.
 - Prepare and file landlord's affidavit.
 - ☐ Apply to court for judgment on default:
 - Serve notice of proof hearing, if required.
 - Prepare affidavit in deficiency suits, repossession of chattels, and negligence actions involving damage to property.

Authority: N.J. Ct. R. 6:6-3.

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Forms: Form CLP 2.211.07, Special Civil Part Affidavit of Proof and Non-Military Service

Form CLP 2.211.08, Proposed Order of Final Judgment by Default in Special Civil Part

Form CLP 2.211.09, Letter to Special Civil Part Clerk for Filing Certification in Support of Proof of Service

Form CLP 2.211.10, Letter to Special Civil Part Clerk for Filing Affidavit of Proof and Non-Military Service and Certification of Counsel

Form CLP 2.211.13, Letter to Special Civil Part Clerk Requesting Judgment Information

Discussion: *See §§ 2.12, 2.13 below.*

- ☐ Move for judgment in uncontested foreclosure actions.
 - ☐ Obtain judgment in mortgage foreclosure actions:
 - Move on notice for entry of judgment.
 - Submit affidavit providing proof of amount due.
 - ☐ Obtain judgment in uncontested tax foreclosure actions:
 - Serve order of redemption.
 - Publish and/or post order of redemption.

Authority: NJS 46:8B-21; NJS 54:5-98; N.J. Ct. R. 4:64.

Discussion: *See § 2.13[4] below.*

- ☐ Move to set aside default or default judgment:
 - ☐ Review applicable court rule, distinguishing standard for vacating default as opposed to standard for vacating default judgment.
 - ☐ Ascertain if service of process was substantially deficient, and move within reasonable time to vacate default judgment.
 - ☐ Ascertain if excusable default exists, and make motion establishing excusable default and meritorious defense.

Authority: N.J. Ct. R. 4:43-3, 4:50-1; *Jameson v. Great Atl.*

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& *Pac. Tea Co.*, 363 N.J. Super. 419, 425, 833 A.2d 626 (App. Div. 2003); *Sobel v. Long Island Entm't Prods., Inc.*, 329 N.J. Super. 285, 293, 747 A.2d 796 (App. Div. 2000); *Bernhardt v. Alden Cafe*, 374 N.J. Super. 271, 864 A.2d 421 (App. Div. 2005).

Forms: Form CLP 2.211.11, Letter to Clerk for Filing Consent Order Vacating Default Judgment

Form CLP 2.211.12, Letter to Special Civil Part Clerk Requesting Vacation of Default Judgment

Discussion: See §§ 2.17 below.

§ 2.12 Entering Final Judgment by Clerk

[1] Filing Non-military Affidavit

Before the entry of a judgment by default, proof must be filed that the defendant is not in the military service of the state or of the United States. This is generally done by submitting, as part of the application for a default judgment, an affidavit attesting to an investigation undertaken by plaintiff to determine if the defendant is in military service.

Both the New Jersey Soldiers' and Sailors' Civil Relief Act, NJS 38:23C-1–38:23C-26, and the Servicemembers' Civil Relief Act, 50 USCS Appx § 501 *et seq.*, enacted in 2003 to strengthen the procedural protections afforded to those persons in active military service set forth in the former Soldiers' and Sailors' Civil Relief Act of 1940, provide procedural protections to members of the military, and in particular, provide protection from the entry of default judgments. A judgment entered in the absence of the affidavit of non-military service is not void, but merely voidable by a person within the protection of the statute. *PNC Bank, N.A. v. Kemenash*, 335 N.J. Super. 124, 761 A.2d 118 (App. Div. 2000) (defaulting defendant who is not in military, or defendant who is absent without leave from military service, may not employ procedural protections of these statutes in order to vacate default judgment).

In furtherance of the requirements of both the state and federal statutes, N.J. Ct. R. 1:5-7 requires that an affidavit of non-military service be filed before entry of a default judgment. The rule requires that an affidavit of non-military service must either be based on facts admissible in evidence, or be accompanied by a statement from the United States Department of

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Defense that the defendant is not in military service. A statement from the Department of Defense may be obtained by mail or through an internet website (<https://www.dmdc.osd.mil/scra/owa/home>), but the servicemember's social security number must be provided in order to access the information.

Recent amendments to the rule adopted in 2006 clarify that when neither evidentiary facts nor a statement from the military are obtained, the affiant must affirmatively state that he or she was unable to determine whether the defendant is, or is not, a member of the armed services. The Servicemembers Civil Relief Act, 50 USCS Appx § 521, provides that, when it cannot be determined whether the defendant is in the military, the court may then require the plaintiff to post a bond, and the rule therefore tracks the requirement of federal law that if the military status of the defendant is not known, the court may require the posting of a bond.

In the event the defendant is in active military service, both state and federal law require that no default judgment may be entered unless an attorney is appointed to represent the defendant. In this regard, 50 USCS Appx. § 521(b)(2) provides that, if a defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed to represent a servicemember cannot locate the servicemember, actions by the attorney in the case shall not waive any defense of the servicemember or otherwise bind the servicemember. 50 USCS Appx § 521(b)(2).

⌘ **Strategic Point:** If circumstances exist that warrant vacating a default judgment on the ground that defendant was in military service, those same circumstances will ordinarily also warrant vacating the underlying default, if the default was obtained while defendant was serving in the military. *Bernhardt v. Alden Cafe*, 374 N.J. Super. 271, 864 A.2d 421 (App. Div. 2005) (court found that defendant's active military service excused his default and that, treating his application indulgently, he had potentially meritorious defense that he would not be able to present unless default were also vacated).

● **Timing:** NJS § 38:23C-4 requires a non-military affidavit to be filed within 20 days before the entry of a judgment or final order.

Forms: Form CLP 2.211.01, Affidavit of Proof and Non-Military Service

[2] Obtaining Judgment from Clerk in Superior Court Actions

If the claim against the defendant is for a sum certain, or a sum which can by computation be made certain, the plaintiff may request that the clerk enter judgment. N.J. Ct. R. 4:43-2(a). The request to the clerk must be accompanied by an affidavit and copies of the documents evidencing the obligation. The affidavit must set forth:

1. A particular statement of the items of the claim, their amounts and dates;
2. A calculation of the amount of interest (including pre-judgment interest either in accord with the contract or obligation which was breached by defendant, or in accord with N.J. Ct. R. 4:42-11 (a)), and a statement of the date of defendant's breach for the purpose of calculating pre-judgment interest;
3. Payments received or credits; and
4. The net amount due.

Plaintiff also must annex to the affidavit a copy of any note, check, bill of exchange, book of account, or other record evidencing the indebtedness.

Exception: If the defendant is a minor or mentally incapacitated person, final judgment by default may not be entered by the clerk pursuant to N.J. Ct. R. 4:43-2(a). Instead, application for entry of judgment against a minor or incapacitated person must be made to the court pursuant to N.J. Ct. R. 4:43-2(b), and the minor or incapacitated person must be represented by a guardian or guardian ad litem.

Forms: Form CLP 2.211.02, Proposed Order of Final Judgment by Default

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Form CLP 2.211.03, Letter to Clerk for Filing Certification in Support of Proof of Service

Form CLP 2.211.04, Letter to All Parties Forwarding Copy of Default Judgment

Form CLP 2.211.05, Certification of Service of Notice of Motion to Enter Final Judgment by Default

Form CLP 2.211.06, Certification in Support of Plaintiff's Motion for Entry of Final Judgment by Default

[3] Obtaining Judgment from Clerk in Special Civil Part Actions

[a] Obtaining Entry by Clerk of Money Judgment

If the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain, N.J. Ct. R. 6:6-3(a) provides that the plaintiff may request that the clerk enter judgment by presenting an affidavit of proof setting forth:

1. A particular statement of the items of the claim, the amounts and dates;
2. The calculated amount of interest. If pre-judgment interest is sought, the affidavit must state the date of defendant's breach and the amount of prejudgment interest demanded. The calculation of prejudgment interest is based on the interest rate set forth in the document of obligation, or if none, in accordance with N.J. Ct. R. 4:42-11(a);
3. The payments or credits, if any;
4. The net amount due;
5. The name of the original creditor if the claim was acquired by assignment; and
6. A statement, by or on behalf of the applicant for a default judgment, that sets forth the source of the address used for service of the summons and complaint. (This statement may be contained in the affidavit of proof, or it may be submitted as a separate statement.)

N.J. Ct. R. 6:6-3(a).

The affidavit must be sworn to not more than 30 days prior to its

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presentation to the clerk and, if not made by plaintiff, explaining facts showing how the affiant is authorized to make the statement. N.J. Ct. R. 6:6-3(a)

If a statute provides for a maximum fixed amount as an attorney's fee, and if the amount of the fee sought is specified in the complaint, the clerk will add it to the amount due. In lieu of the form of affidavit of service required by N.J. Ct. R. 4:42-9(b), an attorney may file a certification that sets forth the amount of the fee sought, how the amount was calculated, and identifies the statutory provision and, where applicable, the contractual provision that provides for the fixed amount.

If the claim is founded on a note, contract, check or bill of exchange, or is evidenced by entries in the plaintiff's book of account, or other records, a copy must be attached to the affidavit. The clerk may require that the originals of these documents be produced for inspection.

If plaintiff's records are maintained electronically, and the claim is founded on an open-end credit plan, as defined in 15 USCS § 1602(i) and 12 CFR § 226.2(a)(20), a copy of the periodic statement for the last billing cycle, as prescribed by 5 USCS § 1637(b) and 12 CFR § 226.7 , or a computer-generated report setting forth the previous balance, identification of transactions and credits, if any, periodic rates, balance on which the finance charge is computed, the amount of the finance charge, the annual percentage rate, other charges, if any, the closing date of the billing cycle, and the new balance, if attached to the affidavit, shall be sufficient to support the entry of judgment. N.J. Ct. R. 6:6-3(a).

Exception: If the defendant is a minor or mentally incapacitated person, final judgment by default may not be entered by the clerk pursuant to N.J. Ct. R. 6:6-3(a) or (b). Instead, application for entry of judgment against a minor or incapacitated person must be made to the court pursuant to N.J. Ct. R. 6:6-3(c), and five days' written notice must be provided to the guardian or guardian ad litem of the minor or mentally incapacitated person.

● **Timing:** A plaintiff must apply for a default judgment within four months after entry of the default, or the court will notify plaintiff that

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it will dismiss the action in accordance with N.J. Ct. R. 1:13-7, for failure to prosecute. *See* N.J. Ct. R. 4:43-2(d). If a party entitled to a judgment by default fails to apply for judgment within six months after entry of default, judgment may not be entered except on motion to the court filed and served in accordance with N.J. Ct. R. 1:6. N.J. Ct. R. 1:6(d).

Forms: Form CLP 2.211.07, Special Civil Part Affidavit of Proof and Non-Military Service

Form CLP 2.211.08, Proposed Order of Final Judgment by Default in Special Civil Part

Form CLP 2.211.09, Letter to Special Civil Part Clerk for Filing Certification in Support of Proof of Service

Form CLP 2.211.10, Letter to Special Civil Part Clerk for Filing Affidavit of Proof and Non-Military Service and Certification of Counsel

Form CLP 2.211.13, Letter to Special Civil Part Clerk Requesting Judgment Information

[b] Obtaining Entry by Clerk of Judgment for Possession in Landlord-tenant Proceedings

In summary actions between landlord and tenant for the recovery of premises, judgment for possession may be entered by the clerk on affidavit within 30 days after entry of the default, if the defendant fails to appear, plead or otherwise defend. N.J. Ct. R. 6:6-3(b). Judgment may not be entered by the clerk in the following circumstances:

1. Tenant is a minor or mentally incapacitated person;
2. Landlord acquired title from the tenant;
3. Landlord has given the tenant an option to purchase the property;
4. More than 30 days have passed since the entry of the default, and the 30-day period has not been extended by court order or written agreement executed by the parties subsequent to the entry of default and filed with the clerk.

The landlord's affidavit must state:

1. Facts establishing the jurisdictional good cause for eviction re-

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quired by the applicable statute; and

2. Charges and fees claimed to be due as additional rent, other than the base rent, are permitted to be charged as rent by the lease and by applicable federal, state, and local law.
3. If a notice to quit was required, the affidavit must state that requisite notice was served as required by law and that facts alleged in the notices are true. (A copy of all required notices must be attached to the landlord's affidavit.)
4. If the landlord is not represented by an attorney, the affidavit must state that the landlord is not a corporation or other business entity precluded from appearing pro se pursuant to N.J. Ct. R. 6:10.

If the landlord is represented by an attorney, the attorney must also submit a certification that the charges and fees claimed to be due as rent, other than the base rent, are permitted to be charged as rent by the lease and by applicable federal, state, and local law.

If the landlord fails to obtain or make written application for the entry of a judgment for possession within 30 days after the entry of default, the entry of judgment requires application to the court with written notice to the tenant, served at least seven days prior to the application. The notice to the tenant must be served either by simultaneously mailing the notice by both certified and ordinary mail, or by service in the manner prescribed for service of process in landlord-tenant actions by N.J. Ct. R. 6:2-3(b).

[c] Giving Notice of Entry of Default Judgment to Defendant

When a default judgment is entered, the clerk must notify the judgment-creditor or judgment-creditor's attorney of the effective date and amount of the judgment. Upon receipt of this notice, the judgment-creditor must, within seven days, notify the judgment-debtor by ordinary mail of the effective date and amount of the judgment.

§ 2.13 Entering Final Judgment by Court

[1] Filing Non-military Affidavit

The requirements for filing a non-military affidavit, discussed above with respect to applications made to the clerk, are equally applicable to applications for judgment made to the court. *See* § 2.12[1] *above*.

Forms: Form CLP 2.211.01, Affidavit of Proof and Non-Military Service

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[2] Obtaining Judgment in Superior Court by Application to Court

[a] Requiring Notice of Motion and Notice of Proof Hearing

All judgments of default not expressly authorized for entry by the clerk must be entered by the court pursuant to N.J. Ct. R. 4:43-2(b). All parties, including defaulting parties, whether or not having appeared in the action, must be noticed, and a motion in accordance with N.J. Ct. R. 1:6 is required. In the likely event that a proof hearing is required to determine the amount of damages, the defendant must be served with notice of the hearing by ordinary mail addressed to the same address where process was served. Proof of service of all required notices shall certify that plaintiff has no actual knowledge that the defaulting defendant's address had changed since process was served. If plaintiff has such knowledge, then the proof shall certify the underlying facts. N.J. Ct. R. 4:43-2(b).

Forms: Form CLP 2.211.02, Proposed Order of Final Judgment by Default

Form CLP 2.211.03, Letter to Clerk Filing Certification in Support of Proof of Service

Form CLP 2.211.04, Letter to All Parties Forwarding Copy of Default Judgment

Form CLP 2.211.05, Certification of Service of Notice of Motion to Enter Final Judgment by Default

Form CLP 2.211.06, Certification in Support of Plaintiff's Motion for Entry of Final Judgment by Default

[b] Obtaining Judgment in Deficiency Suits, Cases of Repossession, Actions for Possession of Land and Negligence Actions Involving Property Damage Only

In cases when an application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, N.J. Ct. R. 4:43-2(b) requires that the plaintiff establish before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, the rule provides that the court need not require proof of title by the plaintiff.

In negligence actions involving property damage only, N.J. Ct. R. 4:43-2

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specifically refers to N.J. Ct. R. 6:6-3(c), which governs proceedings in the Special Civil Part, and requires the same proof in Superior Court actions. *See* § 2.13[c] *below*.

[c] Requiring Proof Hearing

In order to enable it to enter judgment or to carry the judgment into effect, the court may conduct a proof hearing to take an account, to determine the amount of damages, to establish the truth of any allegation by evidence, or to make an investigation of any other matter. N.J. Ct. R. 4:43-2(b). The hearing may be conducted with or without a jury. The plaintiff may consequently be required by the court to establish not only the amount of damages, but plaintiff's entitlement to judgment as well. *Douglas v. Harris*, 35 N.J. 270, 276, 173 A.2d 1 (1961). *See Rosenberg v. Bunce*, 214 N.J. Super. 300, 518 A.2d 1134 (App. Div. 1986) (where there appears to be some question as to plaintiff's right to relief demanded, decision whether to require proof of such right should be left to discretion of trial judge).

In tort actions involving multiple defendants whose percentage of liability is subject to comparison and actions in which fewer than all defendants have defaulted, default judgment of liability may be entered against the defaulting defendants but such questions as defendants' respective percentages of liability and total damages due plaintiff must be reserved for trial or other final disposition of the action. N.J. Ct. R. 4:43-2(b). The rule is designed to preserve the issues of the plaintiff's share of negligence or fault, and the allocation of negligence or fault among numerous tortfeasors, until the time of trial.

[3] Obtaining Judgment on Application to Court in Special Civil Part

Except for money judgments (*see* § 2.12[3][a] *above*), and judgments of possession in landlord-tenant actions (*see* § 2.12[3][b] *above*), the entry of a judgment by default in the Special Civil Part must be obtained by application to the court. N.J. Ct. R. 6:6-3(c).

If the defendant is a minor or mentally incapacitated person, five days' written notice to the guardian or a guardian ad litem appointed for the minor or mentally incapacitated person is required. The court may require written notice to other parties in the interest of justice, and in an unusual case, the plaintiff should consider whether the failure to give notice to the

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defendant will render the default judgment subject to a later motion to vacate under N.J. Ct. R. 4:50. In one case in which the plaintiff sued on a novel legal theory, and the defendant was not given notice of the proof hearing, the court set aside the default judgment. *Siwiec v. Financial Resources Inc.*, 375 N.J. Super. 212, 867 A.2d 485 (App. Div. 2005) (novel issues involved Internet mortgage application and mortgage commitment by e-mail).

In landlord-tenant actions, when a landlord acquired title from the defendant or has given the tenant an option to purchase the property, a judgment for possession by default shall not be entered without proof in open court. N.J. Ct. R. 6:6-3(c). In addition, as noted above, if a party entitled to a judgment by default fails to apply for judgment within six months after entry of default, judgment may not be entered except on motion to the court. N.J. Ct. R. 6:6-3(d).

In deficiency suits or claims based directly or indirectly on the sale of a chattel that has been repossessed peaceably or by legal process, the plaintiff must prove entitlement to a judgment by affidavit containing a description of the property, the amount realized at the sale or credited to the defendant, the costs of sale and such other proof as required by law. N.J. Ct. R. 6:6-3(c).

If the plaintiff's claim is for an unliquidated sum that the court finds is susceptible of proof through personal knowledge (as opposed to opinion or expert testimony), it shall enter judgment by default against a defendant either upon oral testimony in open court or upon affidavit containing the qualifications of the affiant and the information that would be required in the case of oral proof. N.J. Ct. R. 6:6-3(c).

In all negligence actions involving damage to property, proof of negligence of the defendant shall be by affidavit of the person with knowledge of the negligence of the defendant. In automobile negligence actions and insurance subrogation cases proof of the property damage shall be given by an affidavit of an automobile mechanic or an insurance adjuster or appraiser setting forth:

1. The affiant's occupation and business address;
2. If employed, the name of the employer and the affiant's position;
3. The date of inspection of the property involved and, if a vehicle, specifying its make or model, its condition at that time, and its mileage if available;

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4. The repairs actually made and the estimated cost thereof;
5. That the repairs were necessary and the charges therefor were reasonable; and
6. The amount actually paid for repairs, if completed.

The plaintiff may request, or the court after review of the affidavits may require, oral testimony in open court. N.J. Ct. R. 6:6-3(c).

● **Timing:** If a party entitled to a judgment by default fails to apply for judgment within six months after entry of default, judgment may not be entered except on motion to the court. N.J. Ct. R. 6:6-3(d) At the time a default judgment is entered, the clerk will notify the judgment-creditor or judgment-creditor's attorney of the effective date and amount of the judgment. Upon receipt of this notice, the judgment-creditor must, within seven days, notify the judgment-debtor by ordinary mail of the effective date and amount of the judgment. N.J. Ct. R. 6:6-3(e).

[4] Obtaining Judgment in Uncontested Foreclosure Actions

An action to foreclose a mortgage or to foreclose a condominium lien under NJS 46:8B-21 is deemed uncontested under N.J. Ct. R. 4:64-1 if:

1. A default has been entered as to all defendants;
2. None of the pleadings contest the validity of the lien or create an issue as to the plaintiff's right to foreclose; or
3. All of the pleadings have been stricken or otherwise rendered noncontesting. N.J. Ct. R. 4:64-1(c).

As to individual allegations in an answer, a denial without knowledge or information sufficient to form a belief as to the truth of the allegation is deemed noncontesting. N.J. Ct. R. 4:64-1(c). In the event the foreclosure is uncontested, the plaintiff may move on 10 days' notice if there are no other encumbrancers, or on 30 days' notice if there are other encumbrancers, for final judgment. All parties who have appeared must be given notice of the motion, even if the party's answer has been stricken or deemed noncontesting. Defaulting parties must be served only if the motion is brought more than six months after the entry of the default. N.J. Ct. R. 4:64-1(c).

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N.J. Ct. R. 4:64-2 mandates proof of the amount due by affidavit, together with production of the original mortgage or a copy certified by a recording officer or a New Jersey attorney, evidence of the indebtedness, and claim of lien pursuant to NJS 46:8B-21.

In uncontested tax foreclosure actions, an order of redemption in compliance with NJS 54:5-98 and N.J. Ct. R. 4:64-6(b) must be served by ordinary mail on each defendant at least 10 days prior to the date fixed for redemption. In the event a defendant's address is unknown, publication is required, and in the case of an unknown owner, posting is required. The court may enter final judgment on notice to all appearing parties (including those whose answers have been stricken) upon proof of service of the order of redemption, together with plaintiff's affidavit of non-redemption. N.J. Ct. R. 4:64-1(f).

✕ Strategic Point: Pursuant to N.J. Ct. R. 1:4-4(c), an affidavit or certification of amount due in a mortgage foreclosure action may be filed with a facsimile signature on condition that: (1) the attorney offering the document certifies that the affiant acknowledged the genuineness of the signature; and (2) the document or a copy with an original signature will be filed if requested by the court or a party.

§ 2.14 Conforming Judgment with Pleading and Service of Judgment

The final judgment may not be different in kind nor exceed the amount demanded in the pleading, except that in continuing causes, installments coming due after the filing of the pleading but before entry of judgment may be added to the amount of the demand stated in the pleading. N.J. Ct. R. 4:43-2(c).

Within seven days after receipt of the executed judgment from the court, the proponent of the judgment must serve a copy on the defaulting defendant as required by N.J. Ct. R. 1:5-2 except that service may be made by ordinary mail alone.

When a default judgment is entered in an amount different from that set forth in the complaint, the judgment entered is "questionable" under N.J. Ct. R. 4:43-2(c), and is subject to being set aside by the defendant. *Cho Hung Bank v. Kim*, 361 N.J. Super. 331, 825 A.2d 566 (App. Div. 2003)

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(default judgment vacated and case remanded for further proceedings).

§ 2.15 Applying for Entry of Judgment More than Four Months from Entry of Default

If a party entitled to a judgment by default fails to apply therefor within four months after the entry of the default, the court shall issue a written notice in accordance with N.J. Ct. R. 1:13-7(a). N.J. Ct. R. 4:43-2(d). *See* §§ 2.04, 2.05 *above*. Plaintiff should therefore act expeditiously to convert the default into a default judgment in order to avoid administrative dismissal of the action for failure to prosecute.

● **Timing:** In the event a plaintiff receives a notice from the court that a default must be converted to a default judgment, the plaintiff must obtain the default judgment within 60 days to avoid dismissal. N.J. Ct. R. 1:13-7(c).

✂ **Strategic Point:** N.J. Ct. R. 1:13-1 permits the correction of clerical mistakes in judgments by the court on its own initiative or on the motion of any party, even if an appeal is pending. A miscalculation in computing the amount of a judgment, or the failure to specify that joint tortfeasors are jointly and severally liable, are errors that may be corrected under the rule.

§ 2.16 Applying Rules Governing Entry of Default and Judgment by Default to Counterclaims, Cross-claims and Third-party Complaints

The provisions of N.J. Ct. R. 4:43 apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. N.J. Ct. R. 4:43-4.

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§ 2.17 Setting Aside Entry of Default and Judgment by Default

[1] Recognizing Distinction Between Setting Aside Default and Setting Aside Default Judgment

✕ **Strategic Point:** A default may be set aside for “good cause,” and a default judgment may be set aside for those grounds delineated in N.J. Ct. R. 4:50. N.J. Ct. R. 4:43-3. With respect to setting aside default judgments in particular, N.J. Ct. R. 4:50-1(a) (excusable neglect) and N.J. Ct. R. 4:50-1(d) (voidness) are the sections most frequently employed by defendants.

In the event that the defendant becomes aware that a default has been entered, defendant should immediately move to vacate the default before plaintiff takes action to convert the default into a default judgment. The benefit to defendant in moving to set aside the default is that the standard for setting aside a default, that is, “good cause,” is acknowledged by the courts to require a less demanding quantum of proof. *See, e.g., O’Connor v. Abraham Altus*, 67 N.J. 106, 129, 335 A.2d 545 (1975) (although service of process was properly effectuated and default was properly entered, default should have been vacated in view of presence of meritorious defense and absence of any contumacious conduct on part of defendant).

If grounds exist to vacate a default judgment, those same grounds will ordinarily be more than sufficient to vacate the underlying default. *See, e.g., Bernhardt v. Alden Cafe*, 374 N.J. Super. 271, 864 A.2d 421 (App. Div. 2005) (defendant’s inability to defend case due to his active service in military constituted excusable neglect, and his claim of self defense constituted meritorious defense to plaintiffs’ claim; those same circumstances constituted good cause under N.J. Ct. R. 4:43-3 to set aside entry of default).

Forms: Form CLP 2.211.11, Letter to Clerk for Filing Consent Order Vacating Default Judgment

Form CLP 2.211.12, Letter to Special Civil Part Clerk Requesting Vacation of Default Judgment

[2] Moving to Set Aside Judgment on Ground that Judgment Is Void

N.J. Ct. R. 4:50-1 provides the framework for setting aside a void judgment. The fact that there is a defect in service will not necessarily render the default judgment void. A defect in serving process will render the judgment void only if the defect is more than a merely technical or insubstantial violation of the rules regarding service of process. The standard is whether the variance or defect in service constitutes a “substantial deviation from service of process rules.” Only a substantial variance will render the default judgment void. *Jameson v. Great Atl. & Pac. Tea Co.*, 363 N.J. Super. 419, 425, 833 A.2d 626 (App. Div.2003) (in slip-and-fall action service of complaint on head cashier of large supermarket chain in store located in county other than one in which accident occurred was not valid; default judgment vacated); *Sobel v. Long Island Entm’t Prods., Inc.*, 329 N.J. Super. 285, 293, 747 A.2d 796 (App. Div. 2000) (although defendant had actual notice of suit, neither method of service complied with rules for obtaining *in personam* jurisdiction; as there was no laches or estoppel, judgment was void); *M & D Assocs. v. Mandara*, 366 N.J. Super. 341, 841 A.2d 441 (App. Div.), *certif. denied*, 180 N.J. 151, 849 A.2d 184 (2004) (sufficient diligent inquiry under circumstances did not exist, and service by publication was improper and rendered judgment void; meritorious defense is not required to vacate judgment under rule).

The motion to set aside the judgment must, however, be made within a reasonable time after the entry of the judgment. N.J. Ct. R. 4:50-2. *See, e.g., Citibank, N.A. v. Russo*, 334 N.J. Super. 346, 759 A.2d 865 (App. Div. 2000) (where defendant received notification of entry of judgment against him by letter received from plaintiff’s attorney, court found that even if summons and complaint had not been served properly, because defendant delayed more than six years before moving to vacate default judgment, motion was untimely under N.J. Ct. R. 4:50-2 and could not be considered). *See also Philippe v. Anderson*, 227 N.J. Super. 251, 546 A.2d 582 (Law Div. 1988) (defendant’s four-year delay in moving to set aside default judgment, based on defendant’s assertion that he had relied on his attorney to handle matter, was held to be inexcusable).

● **Warning:** *Dynasty Bldg. Corp. v. Ackerman*, 376 N.J. Super. 280, 870 A.2d 629 (App. Div. 2005), held that defendant’s argument that the

claim against him was barred by the statute of limitations did not provide a basis for granting relief from the judgment pursuant to N.J. Ct. R. 4:50-1(f).

[3] Moving to Set Aside Default and Default Judgment on Ground of Excusable Neglect

The failure of the plaintiff to provide the notice of entry of a default as required by N.J. Ct. R. 4:43-1 may provide a basis for a defendant to argue that defendant did not have notice of the entry of the default. In addition, defendant may argue that, as defendant was not aware of the default or the subsequent entry of the default judgment, excusable neglect exists to warrant setting aside judgment under N.J. Ct. R. 4:50-1(a). *See Dynasty Bldg. Corp. v. Ackerman*, 376 N.J. Super. 280, 870 A.2d 629 (App. Div. 2005) (plaintiff's failure to give notice of entry of default did not render subsequent default judgment void, but it did raise issues of fact as to whether sufficient excusable neglect existed to justify setting aside default judgment under N.J. Ct. R. 4:50-1(a)). *See also Regional Constr. Corp. v. Ray*, 364 N.J. Super. 534, 837 A.2d 421 (App. Div. 2003) (when there were other lawsuits involving same parties, and defendant assumed that his counsel in other actions was interposing defense, defendant stated reasonably sufficient excusable neglect in view of short time period of approximately one month between entry of default judgment and motion to vacate).

In order to vacate a default judgment on the ground of excusable default, the defendant must make two showings. The defendant must establish that:

1. The neglect to answer was excusable under the circumstances; and
2. The defendant has a meritorious defense.

A meritorious defense must exist, either as to liability, or as to the amount of damages. The standard is often said to be a liberal one, favoring the defendant, if the requisite showing has been made. *See Marder v. Realty Constr. Co.*, 84 N.J. Super. 313, 318, 202 A.2d 175, 178 (App. Div.), *aff'd*, 43 N.J. 508, 205 A.2d 744 (1964) (excuse offered that corporate defendant's president, an attorney, sent summons and complaint to insurance company which had issued defendant comprehensive liability policy was "weak" but minimally established excuse; while defendant did not deny acts of trespass on narrow strip of land, effect of trespass and quantum of damages was in dispute and thus raised meritorious defense).

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The court may impose terms in a proper case as a condition to setting aside the default judgment, such as imposing counsel fees, but it has been held that requiring the defendant to post a bond to secure the default judgment is an extraordinary remedy that should be exercised sparingly. *John Reiner & Co. v. Dorsey Roofing Co.*, 187 N.J. Super. 51, 453 A.2d 570 (Law Div. 1982) (defendant roofing contractor not required to post bond to obtain relief from default judgment in action on roofing contract).

● **Warning:** In *O'Connor v. Abraham Altus*, 67 N.J. 106, 129, 335 A.2d 545 (1975), the court stated that the showing required for setting aside a default judgment under N.J. Ct. R. 4:50-1 is more stringent than the “good cause” standard for setting aside an entry of default under N.J. Ct. R. 4:43-3.

● **Timing:** N.J. Ct. R. 4:50-1(a) provides for setting aside a judgment that results from “excusable neglect,” in which event N.J. Ct. R. 4:50-2 requires the motion to be made not more than one year after the entry of judgment. In *Farrell v. TCI*, 378 N.J. Super. 341, 875 A.2d 1017 (App. Div. 2005), the court held that, when an order dismissing a case was entered by the court for failure to comply with the rules regarding mandatory arbitration, and no copy of the order was served on plaintiff’s counsel either by the court or by defendant, a motion to vacate the dismissal order made several years later was timely. The court reasoned that implicit in the time proscriptions of N.J. Ct. R. 4:50-2 is that the order from which relief is sought pursuant to N.J. Ct. R. 4:50-1 must first have been served upon the attorney of the party against whom the order was entered as required by N.J. Ct. R. 1:5-1 or the attorney must have actual knowledge of the order. Although *Farrell v. TCI*, *above*, did not involve a default judgment, its holding appears to be broad enough to impact motions to set aside default judgments based on excusable neglect.
