

# Defendant's Motion to Set Aside Default Judgment

In the Justice Court

Precinct 5, Place 1

Harris County, Texas

**Landlord, LLC,**

Plaintiff;

v.

**Donny Defendant,**

Defendant.

Cause No.

**234816000010**

**Defendant's Motion to Set Aside  
Default Judgment**

## Background

Donny Defendant is a veteran and refugee of the Afghan war. He fought with the American troops in Afghanistan until the Afghan government fell to the Taliban in August of 2021, when he was evacuated by the United States military to seek asylum in the United States.

1 | Because refugee programs moved him from place to place around the world and within the  
2 | United States, he left the unit he had been renting from the Plaintiff when his case manager  
3 | incorrectly advised him that he did not have to arrange to terminate the lease agreement.  
4 | He was too unfamiliar with the American landlord–tenant procedure to question his case  
5 | manager's advice. As a result, he “just left” the unit, and the unit has not been his “usual  
6 | place of residence” since May 2022.

## Argument

1 The Court should set aside this default judgment because the citation was not delivered  
2 to the Defendant's usual residence and the citation was not issued pursuant to the Texas  
3 Rules of Civil Procedure. Additionally, the Plaintiff has forfeited the right to do business in  
4 Texas, and therefore had no legal capacity to bring a lawsuit.

### **I. Donny Defendant did not have notice of the suit because the citation was not delivered at his usual residence.**

5 The Texas Rules of Civil Procedure (the "Rules") require that citation for eviction cases  
6 be served "at the defendant's usual place of residence." Tex. R. Civ. Pro. 510.4(b)(2).  
7 The Rules do not define what "usual place of residence" means, but the Houston Court  
8 of Appeals affirmed in the *Butler v. Ross* that a party must do due diligence in effecting  
9 service of process upon an opposing party. *Butler v. Ross*, 836 S.W.2d 833, 836 (Tex. App.—  
10 Houston [1st Dist.] 1992, no writ). In that case, the appellant was a defendant whose original  
11 citation was not served properly. *Id.* at 834. The court in *Butler* ruled that the plaintiff did  
12 not exercise due diligence in determining where the defendant's usual place of residence was  
13 to properly bring the suit. *Id.* at 836. Because of that lack of due diligence, the court sided  
14 with the appellant and determined that the plaintiff should take nothing by its suit. *Id.*

15 Here, like in the *Butler* case, (1) the Plaintiff did not do due diligence to find out where the  
16 Defendant's usual place of residence was, apparently simply assuming it was the Plaintiff's  
17 unit; and (2) the Defendant's usual place of residence had changed more than six months  
18 before the suit had been brought.

### **II. The citation was not issued pursuant to the Texas Rules of Civil Procedure.**

19 A citation that gives a day for the trial which is more than 21 days after the date the  
20 petition was filed is improper. Tex. R. Civ. Pro. 510.4(a)(10). Here, the original petition  
21 was filed on 03 January 2023. The latest that the citation could tell Donny Defendant to

1 appear for trial would be 21 days after 03 January, which is 24 January 2023. However, this  
2 citation was not delivered until 09 February 2023, and the trial was set for 14 February 2023.

**III. Donny Defendant was not properly served with citation because the citation was not delivered at least six days before the trial.**

3 The Texas Rules of Civil Procedure require that citation for eviction cases must be served  
4 “at the defendant’s usual place of residence, at least 6 days before the day set for trial.” Tex.  
5 R. Civ. Pro. 510.4(b)(2). The procedure for computing time in the same Rules provides,  
6 “The day of the act, event, or default after which the designated period of time begins to  
7 run is not to be included.” Tex. R. Civ. Pro. 4. This is also reflected in the Justice Court  
8 rules (the “500 rules”), providing that, when computing a time period required by the Rules,  
9 the Court should “exclude the day of the event that triggers the period.” Tex. R. Civ. Pro.  
10 500.5(a)(1).

11 Because the citation must be served six days before the trial, the “event” here is the  
12 service of citation. *See* Tex. R. Civ. Pro. 4, 500.5(a)(1). The timestamp on the eviction  
13 citation notes that it was delivered on 09 February 2023. The court date was 14 February  
14 2023. Excluding 09 February 2023, six days later is the earliest date that the trial could  
15 have been set under the Rules is 15 February 2023. Thus, Donny Defendant did not receive  
16 an adequate citation and the original judgment should be vacated.

**IV. The Plaintiff does not have the legal capacity to sue because it has forfeited its right to transact business in Texas.**

17 Landlord, LLC is a Texas Limited Liability Company. Entities like Landlord, LLC are  
18 subject to the Texas franchise tax, and, if the LLC has not reported to the Texas comptroller  
19 as required, it forfeits its right to bring or defend lawsuits in Texas. Tex. Tax Code §§ 171.251,  
20 171.252, 171.2515.

1       Because Landlord, LLC has forfeited its right to transact business in Texas, it has no  
2 right to bring this suit, and the suit must be dismissed.

Respectfully submitted,  
HAWKS LEGAL  
Darris Hawks  
Bar No. 24108878  
Attorney for Donny Defendant  
4414 82nd St. Ste. 212-1048  
Lubbock, Texas  
(806) 316 5291