

## **RULE 4:51. Ne Exeat; Capias**

### **4:51-1. Issuance; Service**

The writ of ne exeat or capias ad respondendum, serving as original or mesne process, shall issue only on court order after application supported by affidavit and, if the court directs, by the taking of oral testimony. The writ may issue against one or more of the defendants and shall be returnable at such time as the court directs. If issuing as original process it shall be served with the complaint and the defendant arrested and the writ shall state that the defendant's answer shall be served within 35 days after the arrest or within such further time as is permitted by these rules where a summons is served. The court shall fix the amount of bail, which shall be stated on the writ and shall direct the executing officer to release the defendant upon furnishing the officer with a bond or cash deposit in the amount of the bail as provided by R. 4:51-2(b) and shall further direct the executing officer that in the event the defendant is unable or refuses to furnish said bond or deposit, to bring defendant forthwith to the judge issuing the writ or to any other judge therein named. R. 4:51 does not supersede the ne exeat provisions of N.J.S.A. 49:3-45 (Real Estate Syndication Offerings Law).

Note: Source-R.R. 4:66-1. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994.

### **4:51-2. Execution; Bond**

- **(a) Release on Bond or Cash Deposit.** A defendant who is arrested either on a writ of capias ad respondendum or ne exeat and who fails or refuses to furnish a bond or cash deposit as is hereinafter described shall be brought immediately before the judge who issued the writ or the judge named therein, who shall forthwith advise defendant of the right to be released on bond with such sureties, if any, as the court shall by order direct, hear the defendant as to the amount of bail and fix the same by order, and advise defendant of the right to challenge the basis for the issuance of the writ pursuant to R. 4:51-3.
- **(b) Condition of Bond; Cash Deposit.** The sheriff shall release the defendant upon the furnishing of a bond conditioned upon obeying the orders and process of the court pending the action and to such process as shall be issued to compel the performance of the judgment therein and that defendant shall appear before the court, or any officer thereof, when so required by court order. The sheriff may in lieu of bond accept a deposit in cash in the amount of the bail. The making of such deposit shall not prevent defendant from moving to set aside the order for bail. If the order for bail is later set aside or the defendant recovers judgment in the action, the money deposited shall be returned to the person who made the deposit; but if the plaintiff recovers judgment and the money is the defendant's, it shall be applied toward the satisfaction of the judgment.
- **(c) Exceptions or Objections to Bond or Bail.** Exceptions or objections to bail or to the bond may be made by motion served upon the parties and the bail or the obligor on the bond within 20 days after bail or bond has been filed or posted. Upon such motion the court may approve the bail or bond or order new or additional bail or bond. If such new or additional bail or bond is not filed or posted and approved within the time specified in the order, the court shall order the bail to surrender the defendant at a specified time. The court may at any time, on notice of motion to the plaintiff and upon terms, reduce the bail or the bond to an amount deemed just under the circumstances.

Note: Source-R.R. 4:66-2, 4:66-4(a)(b)(c), 4:66-5(a)(b). Paragraph (c) amended by order of September 5, 1969, effective September 8, 1969; Caption amended and paragraphs (a) and (b) deleted and new paragraphs (a) and (b) adopted July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994.

#### **4:51-3. Motion to Discharge Writ**

- **(a) Motion to Discharge Before Trial.** The defendant may attack an arrest made under a writ of ne exeat or capias ad respondendum by a motion to discharge on such short notice as the court directs. Upon such motion the court shall determine the sufficiency, in fact and law, of the proof upon which the writ was issued, the plaintiff bearing the burden of proof. The defendant may cause the testimony of any person to be taken either before the court on the hearing of the motion or as provided in these rules for the taking of depositions. The court, if satisfied that the writ should not have issued, shall upon terms make such order for defendant's discharge and the discharge of the bail or bond, if any, as the circumstances require. If the writ was issued as original process, however, the action shall not abate but shall, unless otherwise ordered by the court, proceed as if commenced by summons.
- **(b) Discharge at Trial.** If a defendant has been held to bail or bond and on the trial the court is satisfied that the writ should not have issued it may make a like order of discharge.

**Note:** Source-R.R. 4:66-3(a)(b)(c); paragraph (a) amended July 13, 1994 to be effective September 1, 1994.

#### **4:51-4. Capias; Fraud in Inception of Contract**

If defendant in an action on a contract has been held to bail upon the ground of fraud in the inception of the contract, the fact of the fraud may be inquired into at the trial of the action, and if the court then determines from the evidence and certifies on the record that there was no fraud, defendant's bail shall be discharged or defendant shall be released from custody.

**Note:** Source-R.R. 4:66-6; amended July 13, 1994 to be effective September 1, 1994.

#### **4:51-5. Effect of Prior Writ of Attachment**

A writ of ne exeat or a writ of capias ad respondendum shall not issue against a defendant whose property shall have been attached under a writ issued in the same action, except as provided in R. 4:60-4 (attachment and arrest).

**Note:** Source-R.R. 4:66-7.