

CITATION: Allen v. Sun Life Assurance Company, 2025 ONSC 2830
COURT FILE NO.: CV-23-00693919-0000
DATE: 20250509

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DAYNAH ALLEN Plaintiff
AND:
SUN LIFE ASSURANCE COMPANY Defendant
BEFORE: Merritt J.
COUNSEL: Oyeyinka Oyelowo Counsel, for the Plaintiff
Kendall Andjelkovic Counsel, for the Plaintiff
HEARD: May 6, 2025

2025 ONSC 2830 (CanLII)

ENDORSEMENT

OVERVIEW

[1] The Plaintiff seeks a date for a motion to strike the Statement of Defence.

DECISION

[2] The motion is not scheduled.

ANALYSIS

[3] The Plaintiff's claim is for long term disability benefits. The Plaintiff claims damages in the amount of \$1,213,537.00.

[4] The Statement of Claim was served on the Defendant on February 1, 2023.

[5] On February 1, 2023 the Defendant delivered a Notice of Intent to Defend together with a request for a brief indulgence with respect to the time for delivering the Statement of Defence.

[6] Between February 1, 2023 and March 6, 2023, Plaintiff's Counsel did not ask Sun Life to deliver its Statement of Defence nor did she say that the Plaintiff intended to note Sun Life in default.

[7] On March 6, 2023 Counsel for the Plaintiff told the Defendant that she intended to note the Defendant in default and proceed with a summary judgment motion.

[8] The Defendant served and filed its Statement of Defence on March 8, 2023.

[9] On April 11, 2023 the Plaintiff filed a Requisition to note the Defendant in Default. The Defendant has not been noted in default.

[10] The Plaintiff first scheduled a motion to strike the Statement of Defence returnable on July 24, 2024. The Defendant prepared materials in response to the motion but the motion was not heard because the Plaintiff failed to file materials.

[11] On July 20, 2024 the Plaintiff obtained a date for an attendance in Civil Practice Court (“CPC”) on August 27, 2024 to book a “summary judgment motion to note the Defendant in default for failing to file and serve their Defence in the time mandated by the *Rules of Civil Procedure* and set a default judgment hearing date”.

[12] In the interim, the Defendant booked a case conference to move the matter along. At the case conference before Associate Justice Brott on August 20, 2024, the Plaintiff resisted the Defendant’s request to set a timetable for her action; she wanted to wait until after the hearing of her motion to strike the Statement of Defence. Associate Justice Brott’s endorsement provides:

Plaintiff’s counsel was urged to not proceed with the motion. Rule 2.01(1) is clear that: "A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) Only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part."

Without any evidence before me in support of this proposed motion, and without any evidence in response, it seems clear that such a motion will not be successful and is a waste of clients' money and court time. The defendant served and filed the Statement of Defence within 2-3 weeks of its due date and prior to any default proceedings. Even if the defendant had been noted in default, it is extremely likely that any court would have set aside such noting in default.

[13] Associate Justice Brott then ordered a timetable as “[t]he plaintiff has been threatening the motion for over a year and the action has accordingly been stalled.”

[14] In spite of Associate Justice Brott’s clear warning, the Plaintiff proceeded to CPC to obtain a date for the motion to strike the Statement of Defence.

[15] The parties appeared in CPC before Dow J. on August 27, 2024. At the CPC attendance before Dow J., Plaintiff’s Counsel represented to the Court that she had made efforts to note Sun Life in default before the Statement of Defence was filed and therefore, it was due to an

administrative error that Sun Life was able to file a Statement of Defence. Dow J's endorsement reads as follows:

The plaintiff seeks a date for a motion to set aside the filing of the Statement of Defence due to a purported error by the court office not previously having noted the defendant in default. I decline to do so as it is very unlikely to succeed and will cause further delay. However, counsel for the plaintiff wished to schedule a Case conference about scheduling such motion and may proceed to do so. The Case Conference judge may review whether costs need to be awarded [if] the Case Conference proceeds.

[16] To date the Plaintiff has not provided any documents to substantiate that she made efforts to note Sun Life in default before March 8, 2023. The requisition to note Sun Life in default that the Plaintiff has referenced in her materials is dated April 11, 2024, over a month after the Statement of Defence was filed.

[17] At the case conference before me on October 24, 2024, the Plaintiff submitted that the Defendant's conduct is egregious, the Plaintiff has suffered substantial prejudice and "[t]o grant the Defendant's Defence an opportunity for trial would bring the administration of justice into disrepute...".

[18] I again explained to Counsel for the Plaintiff that the motion to strike the Statement of Defence would not succeed and the Plaintiff would be facing an adverse costs award. I assumed, perhaps mistakenly, that it must be the client and not her lawyer who was insisting on pursuing this ill-conceived motion. Hence, I agreed to speak with the client directly at a future case conference, if need be.

[19] In my endorsement I said:

If the Plaintiff still wants to schedule the motion, Counsel for the Plaintiff is to contact my Judicial Assistant Therese Navrotski [...] to schedule a further case conference with the parties in attendance with their Counsel".

It was on this basis the case conference today was scheduled.

[20] At the case conference on October 24, 2024 both parties raised concerns about the discovery. My endorsement is very clear. My endorsement provides:

If the Plaintiff does not agree to produce the records sought, the Defendant may bring a motion before an Associate Judge for further and better Affidavit, or other relief, if required.

...

If there is a motion to examine another representative of Sun Life, that motion is to be brought before an Associate Judge.

...

If the Plaintiff seeks an order dispensing with the requirement to mediate, that motion is to be heard by an Associate Judge.

[21] I did not say I was seized of this matter and I am not assigned to case manage it.

[22] My endorsement of October 24 is very clear that the only purpose of a further case conference before me would be to explain to the Plaintiff herself why the motion to strike the Statement of Defence would not be scheduled.

[23] At the outset of the case conference today, I explained to the Plaintiff that the proposed motion to strike the Statement of Defence had no chance of success and would almost certainly result in an adverse costs award, if brought.

[24] Counsel for the Plaintiff then began to re-argue why I should schedule the motion. I had to tell counsel several times, that I had already made a decision and I would not revisit it. Counsel then tried to make submissions about the discovery process which I specifically ruled should be dealt with by way of a motion before an Associate Judge.

[25] I refused to schedule the Plaintiff's proposed motion to strike the Statement of Defence because it is not sufficiently strong to justify scheduling a motion and would inevitably lead to the action being stalled for several more months. The motion is not only weak on the merits, but certain to fail. A two-week delay in filing a defence will not lead to the court striking the Statement of Defence particularly where the Defendant was not noted in default prior to filing the defence.

[26] Rule 1.04(1) provides that the rules are to be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Under r. 2.01(1)(a) the court "may grant all necessary . . . relief, on such terms as are just, to secure the just determination of the real matters in dispute".

[27] The way to secure the just, most expeditious and least expensive determination of this civil proceeding on its merits is not to schedule the Plaintiff's motion. If this motion were to be scheduled it would only cause further delay and expense.

COSTS

[28] The Defendant now seeks full indemnity costs in the amount of \$10,706 including the costs set out in its Costs Outline dated October 7, 2024 plus an additional five hours at the rate of \$225 for a total of \$1,125 for the cost of preparing for and attending today.

[29] The Plaintiff submits that it would be unjust to award costs against her because she is impecunious.

[30] Costs of case conferences may be awarded where a party acts unreasonably: *Davies v Cossnell*, 2022 ONSC 654 at paras. 5 and 21.

[31] In this case the Plaintiff has persisted in her unreasonable pursuit of motion that she was specifically warned would not succeed. The Plaintiff was also expressly warned by Dow J., by me, and by the Defendant about the risk of an adverse costs award if she persisted.

[32] Costs on an elevated scale may be warranted where the unsuccessful party has engaged in behaviour worthy of sanction: *Clots v. Rennie*, 2024 ONSC 1012 at para 7. Costs on a substantial indemnity scale may be warranted where the unsuccessful party has engaged in behavior that is reprehensible, scandalous, or outrageous, and worthy of sanction: *Davies v. Clarington (Municipality)*, 2009 ONCA 722, at para. 28; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134. Substantial indemnity costs are to be awarded “in rare and exceptional cases to mark the court’s disapproval of the conduct of the party in the litigation”: *Hunt v. TD Securities Inc.* (2003), 2003 CanLII 3649 (ON CA), 66 O.R. (3d) 481 (Ont. C.A.), at para. 123.

[33] This is one of those rare and exceptional cases where an award of substantial indemnity costs is required to mark the court’s disapproval of the Plaintiff’s conduct in the litigation. The Plaintiff was warned by three judges that her motion could not succeed and yet she persisted. The Plaintiff was advised numerous times that the Defendant would seek full indemnity costs. The Plaintiff was warned by the court that an adverse costs award was on the horizon and yet she persisted.

[34] The Plaintiff’s conduct in pursuing this ill-conceived motion is conduct worthy of sanction.

[35] The Defendant is entitled to its costs relating to the Plaintiff’s intended motion to strike on a substantial indemnity basis.

[36] I have considered the factors under r. 57.01(1) including the time spent, rates charged, reasonable expectations of the parties, the amount claimed by the Plaintiff in the statement of claim, as well as the fact that I specifically invited the parties to attend today’s case conference so that I could explain my decision to the Plaintiff herself. In my view, having regard to all of the factors, I find that an award of costs against the Plaintiff in the amount of \$7,500 inclusive of HST and disbursements in any event of the cause, is appropriate. I am not ordering the Plaintiff to pay these costs now or within 30 days because of her impecuniosity.

Merritt, J.

Date: May 9, 2025