CITATION: Markowitz v. Travelers Canada, 2026 ONSC 1044
COURT FILE NO.: CV-22-684154
DATE: 2026 02 19

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HOWARD MARKOWITZ, *Plaintiff*

- and -

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY o/a TRAVELERS CANADA, *Defendant*

BEFORE: Associate Justice Todd Robinson

APPEARING: M. Klassen, *for the defendant*

H. Markowitz, *plaintiff (in person)*

HEARD: November 18, 2025 (by videoconference)

REASONS FOR DECISION
(Motion to Set Aside Noting in Default)

[1] The defendant moves to set aside its noting in default. The defendant was noted in default on June 4, 2024, following a demand for a defence on May 22, 2024. That followed several prior demands that were not enforced as the parties coordinated on the plaintiff's insurance claim. After noting the defendant in default, the plaintiff, who is a lawyer, thereafter continued communications with the defendant without ever raising the noting in default. The defendant asserts that it did not become aware of the noting in default until July 2025.

[2] While I understand the frustrations of the plaintiff, looking at the totality of the circumstances, this is not a case where it is fair and just to maintain the noting in default. I am accordingly granting the defendant's motion.

ANALYSIS

Relevant legal framework

[3] Subrule 19.03(1) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 provides that a noting of default may be set aside by the court on such terms as are just. The relevant legal framework for the defendant's motion is set out in *Trayanov v. Icetrading Inc.,* 2023 ONCA 322.

[4] In *Trayanov*, at paras. 19-20, the Court of Appeal reiterated the discretionary nature of whether to set aside a noting in default as well as the strong preference for deciding civil actions on their merits, the desire to construe rules and procedural orders non-technically and in a way that gets the parties to the real merits, and whether there is non-compensable prejudice to either party.

[5] The Court of Appeal further discusses the non-exhaustive list of relevant factors that may be considered when deciding whether to set aside a noting in default. They include the parties' behaviour; the length of the defendant's delay; the reasons for the delay; the complexity and value of the claim; whether setting aside the noting of default would prejudice a party relying on it; the balance of prejudice as between the parties; and whether the defendant has an arguable defence on the merits.

[6] I have applied the foregoing principles in deciding the defendant's motion.

Length of delay / Reasons for the delay

[7] The statement of claim was issued on July 15, 2022, but not served on the defendant until January 26, 2023. A notice of intent to defend was served on April 27, 2023. The defendant was ultimately noted in default on June 4, 2024, following a demand for its statement of defence on May 22, 2024. This motion was not brought until July 2025.

[8] I am satisfied and accept the defendant's evidence that it was unaware of the noting in default and that the demand for a defence was overlooked. Although the plaintiff submits that I should find that the defendant's evidence on overlooking the demand is unreliable or lacking in credibility, I reject that argument. The plaintiff's demand for the defence was included in a lengthy email that, at the time, was the latest in a series of lengthy emails sent by the plaintiff objecting to and complaining about the defendant's handling of the insurance claim. I accept that it was inadvertently overlooked, as stated in the supporting affidavit.

[9] The context in which the email was sent also matters. The record discloses ongoing communications between the parties dating back to June 2023, including on-site meetings at the plaintiff's property. This is not a case where the defendant was served with the claim and was disengaged from the plaintiff.

[10] Moreover, in response to a prior indication by the plaintiff in April 2024 that the defendant may be noted in default, the defendant's lawyer confirmed that a statement of defence would be served. In reply, on April 9, 2024, the plaintiff confirmed, "I don't need Travelers' Statement of Defence at this time, so long as there's meaningful progress/communications taking place." The defendant submits that it relied on that representation.

[11] A few weeks later, on May 2, 2024, the plaintiff followed up again. In that email, he referred to the litigation briefly, stating, "I've been extremely courteous with our lawsuit on hold on my impression we're dealing in good faith, as legally required by any insurer." There was no demand for a defence. A further email was sent on May 15, 2024, which did not refer to the litigation. The lengthy May 22, 2024 email was thereafter sent, in which a short demand for the defendant's defence was included a few paragraphs before the end of the email.

[12] In July 2024, the defendant provided what it viewed as a final claim settlement with cheque, to which the plaintiff responded requesting clarifications. No mention of the noting in default was made. A further exchange followed between the plaintiff and the defendant's lawyer, after which both parties failed to communicate with one another until a year later in July 2025, when a letter was sent to the plaintiff confirming an underpayment of $442.46, enclosing a cheque in that amount. That letter led to the noting in default being discovered.

[13] I agree with the plaintiff that the defendant is not blameless here. In my view, particularly in the face of prior demands for a defence, the defendant ought to have communicated with the plaintiff about his intentions for this litigation given that the defendant's disposition of the insurance claim was far less than what the plaintiff had been seeking based on the correspondence before me. Regardless, though, I find that the delay has been adequately explained on the record before me. The failure to serve a statement of defence is reasonable in all the circumstances and this motion was promptly brought after learning about the noting in default.

[14] The defendant's silence in the interceding year lacks reasonable explanation, but that silence was mutual between the parties. The plaintiff also took no further steps in this litigation. I accept that the defendant had no notice of being noted in default. Since the plaintiff engaged in further discussions *after* noting the defendant in default without raising the lack of a defence or the noting in default, I also accept that the defendant had no reasonable basis to believe that it had been noted in default or would be noted in default.

Behaviour of the parties

[15] The plaintiff submits that the defendant has come to court lacking "clean hands". Specifically, the plaintiff asserts that the defendant acted contrary to its duties of good faith in dealing with the plaintiff. That is disputed by the defendant.

[16] Much of the plaintiff's responding materials focuses on the defendant's handling of his insurance claim prior to and following issuance of the statement of claim. The plaintiff argues that such conduct and behaviour is relevant given the Court of Appeal's direction that the court should consider "the full context and factual matrix in which the court is requested to exercise its remedial discretion": *Trayanov, supra* at para. 19. However, I have been directed to no case law supporting that conduct directly relevant in deciding the underlying claim is also relevant context on a motion to set aside a noting in default.

[17] I need not go too far down that road, though. I have insufficient evidence before me to make a finding that the defendant was acting in bad faith in its dealings with the plaintiff. The plaintiff's affidavit and argument outlines self-serving and understandably biased views of events, which are uncorroborated by anything other than his own emails. It is not enough to make a finding on the defendant's conduct. What the record does support, though, is that the defendant was dealing directly with the plaintiff and the plaintiff's insurance claim (albeit not to the plaintiff's satisfaction) both before and after the noting in default.

[18] The plaintiff's own behaviour is a relevant factor as well. Although I both understand and appreciate the frustration and angst that the plaintiff felt while the defendant's investigation and

remediation work dragged on, I cannot overlook that the plaintiff is a practicing lawyer. While giving notice of his intention to note the defendant in default, he did not advise the defendant that it had been done in any of his subsequent communications in July 2024. In my view, whatever the plaintiff's personal views may have been at the time of noting the defendant in default, continuing communications with the defendant after having done so, but not raising the noting in default, was improper for a lawyer to have done.

Complexity and value of the claim

[19] This is a significant claim. The plaintiff claims $1.5 million in damages, relief from any bars in the insurance policy that may preclude adjudication of the insurance claim, and completion of the insurance claim. Nowhere near the claimed damages amount has been quantified in the record before me, albeit that the plaintiff acknowledges that he picked a large number given the value of his house with a view to working with the defendant on a damages assessment.

[20] I am satisfied that, factually and legally (particularly with respect to the insurance policy and applicable principles of bad faith), this case has numerous complexities. This factor weighs in setting aside the noting in default so that theses issues may be tried on their merits.

Balance of prejudice

[21] I find that the balance of prejudice favours setting aside the noting in default. The plaintiff argues that he has been prejudiced by failing to advance claims against other persons in reliance on the noting in default. However, there is no evidence of any steps being taken to pursue default judgment after the noting in default. The claim is unliquidated. Insufficient evidence has been tendered to assess the merits of the claim. It is thereby far from clear that a judgment would be obtained against the defendant on motion to a judge. I am unable to find that reliance on the noting in default in not pursuing claims against others was reasonable and, accordingly, do not find it to be relevant prejudice.

[22] The plaintiff argues that loss of peace of mind is another form of prejudice. I accept that there has been some sense of calm following the noting in default, but as already noted no steps were taken to seek default judgment in over a year after noting the defendant in default. Litigation does often come with a psychological and emotion toll on litigants, including loss of time with family, friends, and other commitments. However, those are not unique to this case, but are present in all litigation. I am not convinced that a noting in default itself reasonably gives rise to any finality supporting peace of mind. A default judgment may have done that, but was not sought or obtained. In the circumstances, I reject that peace of mind to the plaintiff and his family is material prejudice on a set aside motion where no default judgment has been sought, let alone obtained.

[23] Conversely, the prejudice to the defendant is obvious. Maintaining the noting in default and denying it a defence will expose it to liability for a significant damages claim based on bad faith in circumstances where the defendant remained engaged with the plaintiff and his claim, albeit not to the plaintiff's satisfaction. I have difficulty accepting the plaintiff's argument that there is no prejudice to the defendant given the basis upon which liability is pursued.

Meritorious defence

[24] The defendant argues that it has meritorious defences and points to its statement of defence. The draft defence is *pro forma*. The plaintiff further asserts that the defendant has no plausible defence, submitting that the damages arguments are matters of assessment and the proposed limitations defence does not make sense. Although it is beyond the scope of this motion to decide a limitations defence, I do note that the underlying incident took place in January 2020, with the claim issued in July 2022. Accounting for the impact of the suspension of limitation periods in O Reg 73/20, the statement of claim does appear to have been issued in time.

[25] I note, though, that courts rarely require a defendant who has been noted in default to show an arguable defence on the merits. In cases involving significant delay, the moving party may be required to show an arguable case on the merits: *Franchetti v. Huggins*, 2022 ONCA 111 at para. 10. I am not convinced that the merits of a defence should be given much weight on this motion. In any event, whether the damages claimed are covered by the policy and proper quantification of damages are defences that do appear to have an "air of reality", even if I question the foundation of a limitations defence. In my view, there is a sufficiently arguable defence on the merits to warrant permitting the defendant to advance it, particularly given the significant claim and allegations of bad faith against it.

[26] For these reasons, I am granting the motion, setting aside the noting in default and permitting the defendant to deliver a statement of defence. However, the proforma defence proposed is woefully inadequate and does not comply with the requirements of subrule 25.06(1) of the *Rules of Civil Procedure*, namely that it fails to plead material facts relied upon in the defence, instead containing not much more than bald denials of the plaintiff's claims. A more particularized statement of defence is required.

COSTS

[27] In the event of success, the defendant sought costs on a substantial indemnity scale in the amount of $4,600. The costs outline submitted seeks full indemnity costs, but the defendant quickly resiled from seeking such costs upon me questioning the basis for such a costs award.

[28] The plaintiff concedes that partial indemnity costs are appropriately awarded if his opposition was unsuccessful, but that they should be payable in the cause.

[29] I agree that substantial indemnity costs are not warranted in this case. An award of costs on an elevated scale is justified in only very narrow circumstances: where an offer to settle is engaged or where the unsuccessful party has engaged in behaviour that the court views as being worthy of sanction. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation: *Net Connect v Mobile Zone*, 2017 ONCA 766 at para. 8. There is no offer to settle and I am unconvinced that the plaintiff's conduct in noting the defendant in default or conduct in respect of this motion warrants an elevated scale of costs.

[30] With respect to timing of payment, I do not agree that costs should be in the cause. The defendant was successful in its motion and the plaintiff's opposition was unsuccessful. However, this is a case in which I find that costs should not be immediately payable. In my view, the defendant ought not to have rested on its laurels for a year after delivering a final disposition on the plaintiff's insurance claim that was immediately challenged by the plaintiff. The waiver of defence in April 2024 had been made subject to a condition of "meaningful progress/communications taking place". After July 2024, the defendant ceased all communications for a year and did not seek to confirm that the plaintiff had accepted the settlement proposal or otherwise communicate about the plaintiff's intentions for this litigation. It did so at its own risk.

[31] Although successful in the motion, this is a case in which I find it appropriate that payment of the costs award be deferred, but payable in any event of the cause.

DISPOSITION

[32] The defendant's motion is granted, with the noting in default set aside and leave granted to serve a non-proforma statement of defence within twenty (20) days. Costs of the motion are fixed on a partial indemnity basis in the amount of $3,250.00, including HST and disbursements, payable at the conclusion of litigation in any event of the cause.

[33] Order to go in the form of draft order submitted, as amended.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: February 19, 2026