

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
Patrick O'Donnell,)	
operating as JPT Contracting)	<i>Julie Amyotte</i> , for the plaintiff
Plaintiff)	
– and –)	
)	
York Condominium Corporation 82)	<i>Neil Wilson</i> , for the defendant
Defendant)	

Heard on April 7, 2026, at Newmarket

REASONS FOR DECISION

S.T. BALE J.

[1] The defendant moved for an order setting aside the default judgment obtained by the plaintiff on a motion made without notice. At the conclusion of the hearing, I ordered that the judgment be set aside, with brief reasons to follow. The following are those reasons.

[2] The statement of claim was served on October 29, 2024. On December 5, 2024, having not received a statement of defence, the plaintiff noted the defendant in default.

[3] On January 9, 2025, a lawyer acting for the defendant (not counsel on this motion) wrote to the lawyer for the plaintiff advising that she was in the process of being retained by the defendant, that the defendant intended to defend the action, that she required time to review the claim, and that “if this poses any difficulty for you, please advise me.” She also queried whether settlement was possible, in order that unnecessary costs might be avoided.

[4] Later the same day, the lawyer for the plaintiff advised the lawyer for the defendant that the defendant had been noted in default. In response, the lawyer for the defendant requested that the plaintiff consent to delivery of a statement of defence, while at the same time pointing out that if the plaintiff required the defendant to move for an order setting aside the noting in default, the effect of the motion would be to delay prosecution of the plaintiff’s claim.

[5] On January 22, 2025, the lawyer for the plaintiff advised the lawyer for the defendant that the plaintiff would consent to an order setting aside the noting in default, upon payment by the defendant of \$1,431.22 as costs thrown away. She received no response to her email.

[6] On April 1, 2025, the plaintiff moved, without notice, for default judgment. The motion was initially refused, because the total of the invoices referred to in the statement of claim was different from the amount of the requested judgment.

[7] On May 16, 2025, the plaintiff submitted a supplementary affidavit explaining the difference and on June 12, 2025, Christie J. signed judgment for \$115,370.33, plus prejudgment interest and costs.

[8] The plaintiff did not disclose to Christie J. the fact that the defendant had consulted with a lawyer and that there had been discussions between the lawyers which included an agreement by the plaintiff to consent to the setting aside of the noting in default, subject to a payment of costs thrown away.

[9] The plaintiff did not serve the defendant with a copy of the judgment. As a result, the judgment did not come to the attention of the defendant until November 7, 2025, when the defendant received a copy by ordinary mail, together with a notice of garnishment.

[10] As set out in *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, at paras 47-50, the factors to be considered on a motion to set aside a default judgment include:

- whether the motion was brought promptly after the defendant learned of the default judgment;
- whether there is a plausible excuse or explanation for the defendant's failure to deliver a statement of defence within the time provided by the *Rules of Civil Procedure*;
- whether the facts establish that the defendant has an arguable defence on the merits;
- the potential prejudice to the defendant should the motion be dismissed and the potential prejudice to the plaintiff should the motion be allowed; and
- the effect of any order the motion judge may make on the overall integrity of the administration of justice.

[11] However, it is not necessary that all these factors be satisfied in any given case. For example, "the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part": *Mountain View Farms*, at paras. 50-51.

[12] In the present case, upon learning of the default judgment, the defendant immediately retained counsel who contacted plaintiff's counsel requesting consent to the setting aside of the judgment. When that consent was not forthcoming, this motion was brought.

[13] Importantly, the defendant's failure to defend the action within the time provided does not suggest indifference to the plaintiff's claim. Rather, the failure to defend was a result of a combination of the defendant's lawyer's failure to respond to the plaintiff's lawyer's email agreeing to set aside the noting in default upon payment of costs thrown away, and governance issues effectively paralysing the condominium corporation's board of directors.

[14] With respect to the existence of a defence on the merits, the defendant need only show that its proposed defence has an air of reality: *Mountain View Farms*, at para. 51. Here, the defence alleged is that the plaintiff inflated its invoices by approximately 40 per cent. The defendant's evidence of overcharging by the plaintiff meets the air of reality test.

[15] If the default judgment is not set aside, the defendant will be deprived of an opportunity to prove that it was overcharged. If the judgment is set aside, the only prejudice to the plaintiff will be delay. The plaintiff could have avoided any delay by giving notice to the defendant of his intention to move for default judgment, and the delay would have been substantially reduced, had he provided a copy of the judgment to the defendant, as soon as it was obtained.

[16] A consideration of the overall integrity of the administration of justice supports the setting aside of the judgment. It is not in the interests of justice that a judgment be obtained based solely on technical defaults. Rather, the court strives to see that claims are resolved on their merits, whenever that can be done with fairness to the parties: *Nobosoft Corporation v. No Borders, Inc.*, 2007 ONCA 444, at para. 7.

[17] In *Strathmillan Financial Limited v. Teti*, 2021 ONSC 7603, at para. 3, the court said that [w]hen counsel are involved for both sides and are having disagreement about pleadings, timing, or otherwise, it is not appropriate to take default proceedings to enforce the plaintiff's position. There may be a technical default as described in the Rule. But the Rule is inapplicable in the circumstances." And then at para. 5, the court went on to say: "Using the default judgment rules for tactical advantage just sets the parties down the path of unnecessary motions to set aside the default. This is the opposite of ensuring the efficient, affordable, and fair resolution of the civil dispute on the merits."

[18] In the present case, the plaintiff had agreed that the noting in default be set aside on consent. At the time he moved for default judgment, the only unresolved issue was payment by the defendant of costs thrown away.

[19] Although service of a motion for default judgment is not strictly required, it is the best practice to do so: *Madison Homes v. Ng*, 2021 ONSC 3104, at paras. 10-13. This is particularly so where, as in this case, the plaintiff's lawyer has been contacted by a lawyer acting for the defendant, and terms for setting side the noting in default have been discussed.

[20] Paragraph 56 of The Advocates' Society's *Principles of Civility and Professionalism* (which have been endorsed multiple times by this court and the Court of Appeal) provides: "Subject to the applicable rules of practice, advocates should not cause any default or dismissal to be entered without first notifying opposing counsel, if the identity of opposing counsel is known."

[21] Rule 7.2-2 of the Law Society of Ontario's *Rules of Professional Conduct* provides: "A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of the client's rights."

[22] In the present case, in order to know whether the defendant's lawyer's failure to respond to her email of January 22, 2025 was a slip or mistake, rather than a decision not to defend the action, the plaintiff's lawyer needed to contact him find out and to provide a warning that a default judgment would be sought.

[23] Rule 39.01(6) of the *Rules of Civil Procedure* provides: "Where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application."

[24] In the present case, full and fair disclosure of all material facts would include the fact that the defendant had consulted a lawyer and that there had been discussions between the lawyers which included an agreement by the plaintiff's lawyer to consent to the setting aside of the noting in default, subject to a payment of costs thrown away. Had that information been put before Christie J., she might well have required that the motion be made on notice to the defendant.

[25] For these reasons, I ordered that the default judgment be set aside.

[26] As the successful party on the motion, the defendant is entitled to its costs, subject to a set-off for costs thrown away by the plaintiff as a result of the defendant's failure to deliver a statement of defence.

[27] The defendant requests partial indemnity costs of \$9,051.30. However, for the following reasons, I find \$6,000 to be fair and reasonable in the circumstances.

[28] First, the amount requested includes \$1,152 plus GST for attendance at the cross-examination of the plaintiff, a cross-examination which I find to have been unnecessary. With respect to the cross-examination, I also note that rule 39.02(4)(b) provides that "a party who cross-examines on an affidavit is liable for the partial indemnity costs of every adverse party on the motion in respect of the cross-examination, regardless of the outcome of the proceeding, unless the court orders otherwise."

[29] Second, I find that the amount requested is not proportional to the amount in issue or the complexity of the motion. The invoices to which objection is taken total \$108,398. The defendant alleges that that amount is inflated by approximately 40 per cent. If \$108,398 is 140 per cent, then the amount that should have been charged was \$77,427, with the result that the overcharge was approximately \$30,970. With respect to the complexity of the motion, I note that in his oral argument, counsel for the defendant submitted that the defendant should have consented to the motion, because it was "clear that the judgment would be set aside."

[30] Because I have found that the plaintiff's lawyer should have provided notice to the defendant of her intention to obtain default judgment, costs thrown away payable to the plaintiff

will be limited to costs related to the noting the defendant in default, up to and including January 22, 2025. In the absence of a costs outline from the plaintiff, those costs will be fixed at \$1,000.

[31] The costs payable to the plaintiff will be set off against the costs payable to the defendant, with the result that my order as to costs will be that the plaintiff pay the defendant costs of \$5,000.

“S.T. Bale J.”

Released: April 28, 2026

CITATION: O'Donnell v. York Condominium
Corporation 82, 2026 ONSC 2503
COURT FILE NO. CV-24-00002780-0000
DATE: 20260428

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Plaintiff

– and –

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