

CITATION: McNair et al. v. Intact Insurance Company, 2024 ONSC 3821
COURT FILE NO.: CV-23-000093142-0000
DATE: 2024/07/05

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
JAMES McNAIR and DANIEL MIRANDA) Self-represented Plaintiffs
Plaintiffs)
)
– and –)
)
INTACT INSURANCE COMPANY)
Defendant)
) Jaime Wilson, Gowling WLG LLP, for the
) Defendant
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) **HEARD:** May 1, 2024
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2024 ONSC 3821 (CanLII)

REASONS FOR DECISION

Williams J.

Overview

[1] This is further to my endorsement dated May 14, 2024. In that endorsement, I noted that the motion record of the moving party, Intact Insurance Company, did not include the exhibits to the affidavits. I gave Intact seven days to file complete copies of its affidavits. I gave the respondents, James McNair and Daniel Miranda, seven days from the day they received Intact’s complete affidavits to file a supplementary motion record and/or factum if they wished to do so.

[2] Intact filed an amended motion record on May 17, 2024. Mr. McNair, who is not a lawyer and is pursuing the claim on his own behalf and for Mr. Miranda, filed no further documents.

[3] This was a motion by Intact to set aside a noting in default and for leave to deliver a statement of defence and counterclaim and a jury notice within thirty days.

[4] Rules 19.03(1) and 19.08(1) [of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194] provide the basis for setting aside a noting of default and a default judgment, respectively. Both rules give the court discretion to set aside the default "on such terms as are just". (*Intact Insurance Company v. Kisel*, 2015 ONCA 205, at para. 12.) When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case. It should particularly consider such factors as the behaviour of the plaintiff and the defendant, the length of the defendant's delay, the reasons for the delay and the complexity and value of the claim. These factors are not exhaustive. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits. (*Intact Insurance Company v. Kisel*, at para. 13, with case references omitted.)

[5] In the case before me, the parties disagree about when Intact was served with the notice of action and statement of claim. Mr. McNair says he served the pleadings on Intact personally on February 20, 2024. Intact says its Casualty Department was served on February 27, 2024.

[6] My decision does not turn on whether the notice of action and statement of claim were served on the 20th or the 27th of February.

[7] On March 8, 2024, Intact's lawyer, Jaime Wilson, served the plaintiffs with a notice of intent to defend by emailing Mr. McNair. In her covering letter, Ms. Wilson requested a temporary waiver of the requirement to deliver a defence while she reviewed the matter and prepared a response. Ms. Wilson asked the plaintiffs not to note her client in default without reasonable written advance notice. Ms. Wilson requested confirmation that the plaintiffs had received her request for this indulgence.

[8] The plaintiffs did not reply.

[9] Ms. Wilson wrote to Mr. McNair on March 18, 2024, and repeated her request for confirmation of receipt of her correspondence of March 8, 2024. This time, Mr. McNair replied and confirmed that Ms. Wilson had his correct email address.

[10] On March 25, 2024, without prior notice to Intact, Mr. McNair noted Intact in default.

[11] On March 28, 2024, Intact served a statement of defence and counterclaim and a jury notice. Intact learned that it had been noted in default when it attempted, unsuccessfully, to file its documents with the court.

[12] Ms. Wilson wrote to Mr. McNair immediately and asked him to set aside the noting in default. On April 2, 2024, Mr. McNair informed Ms. Wilson that he would not do so. That same day, Ms. Wilson took steps to schedule this motion.

[13] Ms. Wilson subsequently gave Mr. McNair an opportunity to set aside the noting in default without a motion and the associated costs. Ms. Wilson provided Mr. McNair with some applicable case law. She also encouraged him to seek legal advice.

[14] Mr. McNair filed a motion record and a factum and appeared at the hearing of the motion. At the hearing, Mr. McNair said that he had consulted counsel.

[15] In my view, in these circumstances, it was entirely inappropriate for Mr. McNair to have noted Intact in default without prior notice to Ms. Wilson. Mr. McNair was aware that Ms. Wilson had been retained and that Intact intended to defend the action. Ms. Wilson had specifically asked that Mr. McNair not note Intact in default without reasonable advance notice in writing. Mr. McNair had acknowledged receipt of Ms. Wilson's correspondence. While he did not expressly agree that he would provide Ms. Wilson with notice before noting her client in default, he did not say that he would not do so. It was reasonable for Ms. Wilson to assume that Mr. McNair, having received her correspondence, would not note her client in default without advance warning.

[16] That Mr. McNair is not a lawyer is no excuse for his conduct. No legal training was required to understand what Ms. Wilson's expectations would have been after Mr. McNair acknowledged receipt of her March correspondence.

[17] If Intact was served with the statement of claim on February 27, 2024, there was no delay in service of the statement of defence—March 28, 2024, would have been the 30th day following service of the claim, and the statement of defence would have been served in time. If Intact was served with the statement of claim on February 20, 2024, the statement of defence would have been served seven days late.

[18] I do not consider a delay of seven days, if there was such a delay, to be consequential.

[19] The reason for the delay in service of Intact’s statement of defence, if there was a delay, was that Ms. Wilson required time to investigate the claim before preparing a statement of defence. I note that in her email of March 18, 2024, Ms. Wilson told Mr. McNair that her file review was underway. It is routine for insurers to request extra time to deliver their statements of defence. That the statement of defence and counterclaim was complete and served by March 28, 2024 tells me there was no foot-dragging on the part of Intact in responding to the statement of claim.

[20] The plaintiffs’ action is for non-payment of a fire loss claim relating to a motorhome. In addition to the value of the motorhome, the plaintiffs seek damages for financial loss and psychological harm. Intact had denied the fire loss claim based on misrepresentations and because it concluded that the fire was caused by “incendiary act”. Although it is difficult for me to assess the complexity of the case based on the materials before me, my impression is that it is a claim of moderate complexity.

[21] I do not accept Mr. McNair’s submission that the plaintiffs would be prejudiced if the noting in default were set aside. Mr. McNair says the plaintiffs have been harmed by delay. However, the statement of claim was issued in September 2023 but not served until February 2024. If moving the action forward quickly had been a priority for the plaintiffs, I would have expected them to have served their claim immediately after it was issued.

[22] Mr. McNair should not have noted Intact in default without prior notice. I am not persuaded that there was any reason for Mr. McNair not to have granted Intact the indulgence Ms. Wilson had requested. At the very least, having received Ms. Wilson’s correspondence of March 8, 2024 and March 18, 2024, Mr. McNair was required to warn Ms. Wilson that he intended to note Intact in default if its statement of defence was not delivered by a specified date.

[23] For these reasons, the noting in default is set aside.

[24] Intact shall have 30 days to file a statement of defence and counterclaim and a jury notice.

Costs

[25] In an amended bill of costs dated May 14, 2024, Intact stated that if successful on the motion it would seek costs of \$839, comprised of \$500 in fees, inclusive of HST, and \$339 in disbursements.

[26] Intact is entitled to costs. It gave Mr. McNair several opportunities to set aside the noting in default. It provided Mr. McNair with case law and urged him to seek legal advice. Mr. McNair made scandalous and unfounded allegations against Ms. Wilson in his motion materials.

[27] Intact's full indemnity fees for the motion were more than \$5,000, inclusive of HST. Its request for all-inclusive costs of \$839 is more than fair in this case.

[28] Mr. McNair shall pay Intact \$839 in costs. Although there are two named plaintiffs in the action, the costs award shall be against Mr. McNair only.

Date: July 5, 2024

Williams J.

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BETWEEN:

James McNair and Daniel Miranda

Plaintiffs

– and –

Intact Insure Company

Defendant

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Williams J.

Released: July 5, 2024