COURT OF APPEAL FOR ONTARIO

CITATION: Intact Insurance Company v. Kisel, 2015 ONCA 205
DATE: 20150326
DOCKET: C59338 and C59339

Laskin, Simmons and Watt JJ.A.

BETWEEN

Intact Insurance Company

Defendant (Appellant)

and

Yaroslava Kisel

Plaintiff (Respondent)

AND BETWEEN

Intact Insurance Company

Defendant (Appellant)

and

Rade Bijelic

Plaintiff (Respondent)

John A. Campion and Thomas Hanrahan, for the appellant

Alon Rooz, for the respondents

Heard: February 3, 2015

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated August 18, 2014.

Laskin J.A.:

[1] Intact Insurance appeals the refusal of the motion judge to set aside a noting of default and a default judgment of approximately $68,000 obtained against it by the respondents, Rade Bijelic and Yaroslava Kisel. I would allow the appeal. It is not in the interests of justice to maintain either the noting of default or the default judgment.

A. Background

(i) The underlying dispute

[2] Bijelic and Kisel sued Intact, their own insurer, for its alleged failure to comply with a hold harmless agreement signed by the parties following a dispute over the payment of statutory accident benefits.

[3] Bijelic and Kisel, both elderly, were injured in a car accident in December 2009. Each applied for statutory accident benefits from Intact, and most of those benefits were paid. Intact, however, claimed that two of their health service providers – Osler Rehabilitation Centre and Assessment Direct – had submitted invoices for excessive amounts. Intact maintained that the number and frequency of visits by Bijelic and Kisel to these service providers could not be justified.

[4] Intact settled its dispute with Bijelic and Kisel in two stages: first by a partial settlement on February 5, 2013, and then by a full settlement on February 11, 2013. Under the partial settlement, Intact agreed to settle all accident benefit

claims save for outstanding accounts of approximately $60,000 and $67,000, submitted to Intact by the two service providers on behalf of Bijelic and Kisel, respectively.

[5] Under the full settlement, Bijelic and Kisel agreed to release Intact from any further claims, and Intact agreed to hold harmless and indemnify both Bijelic and Kisel from any claims brought by the two service providers for the outstanding accounts. The wording of the hold harmless agreements, which is handwritten, is central to this appeal. The agreement for Kisel states:

> OFFER TO SETTLE ANY OTHER TERMS (specify)
>
> Intact agrees to hold Yaroslava Kisel harmless and indemnify her from any claims brought by Assessment Direct from Osler Rehabilitation Centre, only in relation to the exceptions listed in the partial release, signed February 5, 2013.
>
> The applicant agrees to cooperate fully with Intact and attend an examination under oath forthwith if a claim is commenced as against Ms. Kisel.

The agreement for Bijelic is similar.

(ii) <u>The litigation</u>

[6] Both Osler Rehabilitation and Assessment Direct sent demand letters to Bijelic and Kisel for payment of their outstanding accounts. On receipt of the demand letters, Bijelic and Kisel asked Intact to act under the hold harmless agreements. Intact took the position that the hold harmless agreements had not

been triggered because neither Osler Rehabilitation nor Assessment Direct had started an action for payment of its outstanding accounts.

[7] Nonetheless, though neither service provider had sued, Bijelic and Kisel started these actions – which have led to this appeal – alleging Intact had breached the hold harmless agreements. Their counsel advised Intact that he expected strict compliance with the rules of practice for delivering a statement of defence.

[8] Intact delivered a notice of intent to defend in each action, but did not deliver statements of defence. In this court, Mr. Campion for Intact candidly acknowledged that his client ought to have done so. When Intact did not deliver a defence, each plaintiff moved promptly to obtain a default judgment, in one case, and a noting of default, in the other. The relevant dates are as follows:

(a) Kisel action

- May 13, 2013: Kisel serves statement of claim
- May 30: Intact serves notice of intent to defend
- June 12: statement of defence due
- June 20: Kisel notes Intact in default and obtains default judgment for $67,717, plus costs

(b) Bijelic action

- August 7, 2013: Bijelic serves statement of claim
- August 27: statement of defence due

- September 10: Bijelic notes Intact in default. Bijelic attempts to obtain default judgment, but the registrar refuses to sign the order

- September 18: Intact serves notice of intent to defend

(iii) The motion judge's ruling

[9] Intact moved to set aside the default judgment and noting of default. The motion judge heard both motions together, and gave thorough reasons for dismissing the motions. He referred to a number of cases setting out the factors a judge must consider when determining whether to set aside a default judgment. As I will discuss below, the test for setting aside a default judgment and the test for setting aside a noting of default differ. Given my conclusion, however, that the motion judge ought to have set aside both defaults, his failure to distinguish between the two makes no appreciable difference to the result in this case.

[10] In dismissing Intact's motions, the motion judge accepted that Intact had moved promptly; that it had at least an arguable defence; and that setting aside the defaults would not adversely affect the overall integrity of the administration of justice. Nonetheless, he refused to set aside the defaults for two reasons. First, he did not accept that Intact had a reasonable excuse or explanation for its default. In his words, "Intact's explanation for its default has more impudence than excuse." Second, in his view Bijelic and Kisel would be far more prejudiced by granting Intact an indulgence than would Intact be prejudiced by a refusal to

set aside the defaults. The motion judge therefore concluded that it would not be just to relieve Intact of the consequences of its defaults.

[11] The motion judge also ordered that Bijelic could move, without notice, for a default judgment against Intact. From the motion record, it appears that he did so on September 24, 2014, obtaining a default judgment of $61,306.98, plus costs. This later judgment was not referred to by the parties.

B. Discussion

[12] Rules 19.03(1) and 19.08(1) 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." This court has held that the tests to be met under these rules are not identical. See *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (Ont. C.A.), at pp. 284-85.

[13] When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 285. 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. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444, 225 O.A.C. 36, at para. 3; *Flintoff v. von Anhalt*, 2010 ONCA 786, [2010] O.J. No. 4963, at para. 7. Some

decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see e.g. *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327, at para. 8. 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: *Bardmore*, at p. 285.

[14] On a motion to set aside a default judgment, on the other hand, the court considers five major factors, one of which is whether the defendant has an arguable defence on the merits. The five factors are:

(a) whether the motion was brought promptly after the defendant learned of the default judgment;

(b) whether the defendant has a plausible excuse or explanation for the default;

(c) whether the defendant has an arguable defence on the merits;

(d) the potential prejudice to the defendant should the motion be dismissed, and the potential prejudice to the plaintiff should the motion be allowed; and

(e) the effect of any order the court might make on the overall integrity of the administration of justice.

Again, these factors are not rigid rules. The court has to decide whether, in the particular circumstances of the case, it is just to relieve a defendant from the consequences of default: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194, 372 D.L.R. (4th) 526, at paras. 48-50.

[15] The motion judge applied the test for setting aside a default judgment. As he found that Intact had an arguable defence on the merits, his application of that test alone did not affect the outcome of his decision. He refused to set aside both defaults because he found that Intact had not adequately explained its delay and that Kisel and Bijelic would be prejudiced if he granted the motions. These were relevant considerations both on the motion to set aside the noting of default and on the motion to set aside the default judgment.

[16] Nonetheless, in my opinion the motion judge erred in relying on these two grounds for refusing to set aside the defaults. In my opinion, Intact had a reasonable explanation for its defaults and neither Bijelic nor Kisel would have been prejudiced by allowing Intact to defend each action.

(i) Intact's explanation

[17] In finding that Intact had not offered a reasonable explanation for its defaults, the motion judge stopped short of interpreting the hold harmless agreements. The parties had differed on their interpretation: Bijelic and Kisel maintained that the hold harmless agreements were triggered once the two

service providers served demand letters; Intact maintained that the hold harmless agreements would only be triggered when the service providers started an action. The motion judge thought that Intact had the better interpretation, but concluded it was neither necessary nor appropriate to decide the point.

[18] Yet the proper interpretation of the hold harmless agreement was fundamental to Intact's submission that it had a reasonable explanation for not defending the actions. Intact's simple position was that on a proper interpretation of the hold harmless agreements, Bijelic's and Kisel's causes of action against Intact had not accrued because when they sued Intact, neither service provider had yet sued them.

[19] In this court, both sides filed lengthy written submissions on the interpretation of the hold harmless agreements. It is unnecessary to review these submissions. On the plain wording of these agreements, they do not come into effect until either Osler Rehabilitation or Assessment Direct sues either Bijelic or Kisel. They do not come into effect on a mere demand for payment. The hold harmless agreements provide an indemnity from "any claims" brought by the two service providers, not from any demands for payments. Claims and demands are different. A claim means an action, not a demand letter.

[20] This interpretation is supported by two other provisions of the parties' settlement documents. First, the other handwritten clause in the hold harmless

agreement: “The applicant agrees to cooperate fully with Intact and attend an examination under oath forthwith if a claim is commenced as against Ms. Kisel.” A claim is commenced when an action is started. Until one is started, Kisel would have no obligation to attend an examination.

[21] The second provision supporting this interpretation is included in the terms of the full and final release, which Bijelic and Kisel signed with the benefit of legal advice: Bijelic and Kisel “HEREBY RELEASE AND FOREVER DISCHARGE [Intact] from any and all actions, causes of actions, Mediations, Arbitrations, claims and demands for Statutory Accident Benefits”. In other words, the release distinguishes between claims and demands. The letters from the service providers were “demands” for payment; they were not “claims”.

[22] For these reasons, neither Bijelic nor Kisel had a cause of action against Intact when each chose to sue the insurer in 2013. Thus, though Intact ought to have delivered a statement of defence in each action, it had a reasonable explanation or excuse for not doing so. On this ground alone, I would set aside the noting of default and the default judgment.

[23] During oral argument we were told that both Osler Rehabilitation and Assessment Direct have now sued for payment of their outstanding accounts. In other words, they have made “claims”. In accordance with the hold harmless agreements, Intact has agreed to defend these actions.

(ii) Prejudice

[24] The motion judge found that Bijelic and Kisel would be more prejudiced from setting aside the defaults than Intact would be by maintaining them. That finding is unreasonable. Setting aside the defaults would cause no prejudice to either Kisel or Bijelic. Neither can be inoculated against a claim by the service providers. Short of paying the entire amount of the outstanding accounts of Osler Rehabilitation and Assessment Direct, Intact could not prevent either service provider from suing Bijelic and Kisel. And Intact was entitled to resist paying the full amounts on the ground that the accounts were allegedly unjustified.

[25] Intact, on the other hand, is prejudiced by not setting aside the defaults because it becomes liable for outstanding accounts it disputes and may well have no obligation to pay.

[26] Moreover, this is not a case like many brought under rules 19.03 and 19.08, in which a plaintiff gives a defendant a considerable indulgence before taking default proceedings. Here, Bijelic and Kisel moved very quickly – each noted Intact in default within 45 days of the delivery of the statement of claim. Although they were entitled to do so, and Intact had fair warning that they might do so, the shortness of the period between the delivery of the statement of claim and the noting of default is a consideration on the question of prejudice.

[27] Even if I am incorrect in my interpretation of the hold harmless agreements, on the ground of prejudice alone I would set aside the defaults.

C. Conclusion

[28] I would set aside the noting of default and the later default judgment in the Bijelic action, and the default judgment in the Kisel action. If either plaintiff wishes to continue with his or her action, then Intact must deliver a statement of defence within 30 days of the release of these reasons, failing which each default will be reinstated.

[29] I would order no costs of the motions. Intact is entitled to its costs of this appeal, which I would fix in the amount of $5,000, inclusive of disbursements and applicable taxes.

Released: March 26, 2015 “JL”

“John Laskin J.A.”

“I agree Janet Simmons J.A.”

“I agree David Watt J.A.”