**CITATION:** Kisel v. Intact Insurance Company, 2014 ONSC 4787
**COURT FILE NO:** CV-13-480034
**COURT FILE NO:** CV-13-486195
**DATE:** 20140818

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**



| | |
|---|---|
| **BETWEEN:** | |
| YAROSLAVA KISEL<br>Plaintiff | *Alon Rooz*, for the Plaintiffs |
| **– and –** | |
| INTACT INSURANCE COMPANY<br>Defendant | *Thomas R. Hanrahan*, for the Defendant |
| **AND BETWEEN:** | |
| RADE BIJELIC<br>Plaintiff | |
| **- and –** | |
| INTACT INSURANCE COMPANY<br>Defendant | |
| | **HEARD**: August 11, 2014. |

**PERELL, J.:**

## REASONS FOR DECISION

## A. INTRODUCTION

[1] In two actions, the Defendant Intact Insurance Company brings motions to have a noting in default and a default judgment against it set aside and also motions for summary judgment to dismiss the actions of the Plaintiffs, Rade Bijelic and Yarolsava Kisel.

[2] Mr. Bijelic and Ms. Kisel resist the two-pronged motions of Intact, and notwithstanding that they already have a noting in default and a default judgment, they bring cross-motions for summary judgment against Intact.

[3] Motions to set aside a default judgment are like horseshoes and hand grenades where close to the target is good enough to ensure success. Generally speaking, the administration of

justice is best served when cases are decided on the merits with both sides having their day in court with the loser knowing that he or she did not lose because of the technicality of failing to strictly follow the *Rules of Civil Procedure*. Thus, notwithstanding criticism that judges and masters should enforce the *Rules,* else access to justice will be denied and else procedural anarchy will prevail, judges tend to be very tolerant in exercising their discretion to set aside the noting of a party in default and are similarly tolerant in setting aside default judgments.

[4] In the cases at bar, however, I have decided that the court should not to be so tolerant.

[5] There are five major factors that courts consider on a motion to set aside the noting in default or a default judgment: (1) whether the motion was brought promptly; (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the *Rules*; (c) whether the facts establish at least an arguable defence; (d) the competing potential prejudice to the parties of granting or refusing to set aside the default judgment; and (e) the effect of any order on the overall integrity of the administration of justice. The factors, however, are not treated as rigid rules, and the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

[6] See among a plethora of case law: *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194; *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd*. 2007 ONCA 333; *HSBC Securities (Canada) Inc. v. Firestar Capital Management Corp*., 2008 ONCA 894; *Nelligan v. Lindsay*, [1945] O.J. No. 91 (H.C.J.*); Laredo Construction Inc. v. Sinnadurai*, (2005), 78 O.R. (3d) 321 (C.A.); *Morgan v. Toronto (Municipality) Police Services Board*, [2003] O.J. No. 1106 (C.A.).

[7] In my opinion, in the cases at bar, having regard to the usual criteria used on a motion to set aside a default, Intact brought its motions promptly, it has an arguable defence, and it is just barely close enough about the overall integrity to the administration of justice factor.

[8] However, Intact had fair warning that Ms. Kisel and Mr. Bijelic were expecting Intact to comply with the *Rules of Civil Procedure,* and Intact had fair warning that the Plaintiffs did not agree with Intact's interpretation of the strange Hold Harmless Agreement that is the subject of the dispute between them.

[9] Intact's explanation for its default has more impudence than excuse. As long as it took Intact's lawyer to send letters explaining that Intact would ignore the Plaintiffs' warnings and dismissing the Plaintiffs' interpretation of the Hold Harmless Agreement, it would have been far quicker to deliver a Statement of Defence with the attendant enormous saving of the wasted time and expense to the parties and to the administration of justice that has produced the procedural train wreck of the actions at bar.

[10] Moreover, upon analysis of the Hold Harmless Agreement, which is the subject matter of the two actions, it turns out that Intact's real dispute is not with Ms. Kisel and Ms. Bijelic but with two health service providers, Osler Rehabilitation Centre Inc. and Assessment Direct Inc., and, thus, the elderly Plaintiffs are far more prejudiced by the court granting Intact an indulgence than Intact would be prejudiced by the court refusing to set aside the noting of default and the default judgment.

[11] In my opinion, Intact should stop using the Plaintiffs as pawns in its dispute with the service providers, honour the Hold Harmless Agreement, pay the judgments, and find another way to take its litigate with Osler Rehabilitation Centre and Assessment Direct.

[12] For the reasons that follow, I dismiss all the motions before the court. I will remain seized of the Bijelic action, and Mr. Bijelic may bring a motion in writing without notice to Intact for a default judgment.

## B. PRELIMINARY PROCEDURAL MATTERS

[13] At the hearing of the motions, I told the parties that their respective summary judgment motions were procedurally improper, and I would not deal with them. Technically speaking, these motions should be quashed.

[14] In *Kisel v. Intact Insurance Company,* Ms. Kisel obtained a default judgment. In addition to moving to have the default judgment set aside, Intact brought a motion for a summary judgment. In response to Intact's motion, Ms. Kisel brought a cross-motion for a summary judgment.

[15] The respective motions for a summary judgment demonstrate why the Kisel action is a procedural train wreck. A defendant judgment debtor obviously has no standing to bring a summary judgment motion before the judgment has been set aside, and it is an abuse of process for a plaintiff with a judgment to bring a motion for a redundant summary judgment.

[16] In *Bijelic v. Intact Insurance Company*, Mr. Bijelic noted Intact in default, but the Registrar refused to sign a default judgment. In the normal course, what Mr. Bijelic should then have done is to bring a motion without notice for a default judgment. He, however, did not do that, because before he could do so, Intact had brought a motion to have the noting in default set aside and for a summary judgment dismissing Mr. Bijelic's claim.

[17] Once again, Intact's motion for a summary judgment was improper, and this aspect of the motion should be quashed.

[18] Mr. Bijelic's motion for a summary judgment is not an abuse of process, but it is the wrong procedure after a noting in default where the registrar refuses to sign a default judgment. I, therefore, quash Mr. Bijelic's summary judgment motion, and, as already noted above, I order that Mr. Bijelic may bring a motion in writing for a default judgment.

## C. FACTUAL AND PROCEDURAL BACKGROUND

[19] I shall set out the factual and procedural background below. I shall pause from time to time in the narrative to comment about matters important to Intact's motion to have the default judgment and the noting in default set aside.

[20] On December 30, 2009, Mr. Bijelic (born June 15, 1927) and Ms. Kisel (born August 28, 1939) were injured in a car accident. Mr. Bijelic and Ms. Kisel applied for no-fault accident benefits in January 2010. They respectively received medical treatments and assessments from Osler Rehabilitation Centre and Assessment Direct.

[21] Under Ontario's statutory no-fault automobile accident insurance scheme, Intact Insurance was responsible for Mr. Bijelic's and Ms. Kisel's accident benefits pursuant to the Statutory Accident Benefits Schedule.

[22] Intact alleges that Osler Rehabilitation and Assessment Direct began to submit excessive claims for payments for treatments. In this regard, it may be noted that in May 2012, the

Financial Services Commission of Ontario ("FSCO") charged Assessment Direct with knowingly making false or misleading statements to an auto insurer to obtain payment for services provided to an insured and for engaging in an unfair or deceptive trade practice.

[23] It may also be noted that Intact has commenced proceedings against Assessment Direct and Osler Rehabilitation claiming millions of dollars for payments made on behalf of Intact's insureds.

[24] On January 31, 2013, Intact and Mr. Bijelic and Ms. Kisel entered into a partial settlement of all accident benefits with the sole exception of the outstanding accounts of Osler Rehabilitation Centre and Assessment Direct Inc., the liability for which was to be arbitrated.

[25] The disputed amounts for Osler Rehabilitation were $39,590.33 for Mr. Bijelic and $41,858.12 for Ms. Kisel, and the disputed amounts for Assessment Direct were $20,847.01 for Mr. Bijelic and $25,763.50 for Ms. Kisel.

[26] The nature of the dispute between Intact and Ms. Kisel's and Mr. Bijelic's medical service providers can be appreciated by reading Jonathan Lerman's (Intact's lawyer) letter of February 7, 2013 to the Plaintiffs' lawyer (Anita Lovrich) objecting to the Plaintiffs' plan not to call the treatment providers as witness at the arbitration. Mr. Lerman wrote:

> Intact initially approved a number of treatment plans and assessment plans in good faith, but it became evident that Osler Rehabilitation Centre and Assessment Direct were engaging in a systematic pattern of abuse. This pattern essentially resulted in requests for treatment plans and assessments in the total amounts of $100,802.98 for Rade Bijelic age 86 and $98,438.16 for Yaroslava Kisel age 74 both of whom sustained soft tissue injuries and neither of whom speak English as a first language.
>
> While I can appreciate your attempts to unilaterally reduce the issues in dispute to amounts that were approved but unpaid, these amounts may likely have been generated through inappropriate processes that draw their credibility into question.
>
> By refusing to call the medical personnel who generated these requests, you are denying Intact the opportunity to examine and test the validity of the Applicants' claims. Moreover, as your office has only recently provided my office with the particulars of the amounts claimed to be outstanding, you have prejudiced Intact's ability to prepare for the arbitration.

[27] On February 11, 2013, the parties attended at the FSCO offices, and reached a settlement. Using the standard form, Settlement Disclosure Notice, to which there was a handwritten insertion, they signed Hold Harmless Agreements. The agreement with Ms. Kisel stated, as follows:

> 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, 2015.
>
> The applicant agrees to cooperate fully with Intact and attend an examination under oath forthwith if a claim is commenced as against Ms. Kisel.

[28] The agreement with Mr. Bijelic was similar.

[29] There is a dispute between the parties about the interpretation of the Hold Harmless Agreement. Intact's interpretation is that it had agreed that should court proceedings be brought

against Ms. Kisel or Mr. Bijelic, it would assume responsibility for putting in a defence and Ms. Kisel and Mr. Bijelic would cooperate by attending the examinations for discovery.

[30] Ms. Kisel's or Mr. Bijelic's interpretation of the Hold Harmless agreement is that Intact was obliged to respond to hold them harmless should Osler Rehabilitation Centre or Direct Assessment demand payment, after which Intact could come to terms with the service providers.

[31] While it is not necessary or appropriate for me to decide the point, as a matter of interpretation, the plain language seems to favour Intact's interpretation, but it is understandable that the elderly Ms. Kisel or Mr. Bijelic, in settling their statutory benefit entitlements, would argue that their intention was not to move from being a plaintiff in a personal injury claim to a defendant in their health service providers' action for payment for services for no-fault benefits for which they had insurance.

[32] It did not take long for problems with the Hold Harmless Agreements to emerge.

[33] On February 19, 2013, Assessment Direct demanded payment from Mr. Bijelic and Ms. Kisel, respectively, and on February 21, 2013, Mr. Alon Rooz, the lawyer for Mr. Bijelic and Ms. Kisel, wrote the lawyer for Intact Insurance, and asked that Intact hold his clients harmless in accordance with the Hold Harmless Agreement.

[34] There was no response from Intact's lawyers, and Mr. Rooz followed up on March 7, 2013, and April 1, 2013, all to no avail.

[35] On April 15, 2013, Mr. Rooz wrote Intact directly. The letter stated:

> Please find enclosed copies of our letters to Mr Jonathan Lerman dated February 21 2013, March 7, 2013 and April 1 2013, all of which he may have forwarded to you already. As I have not received a reply from him, I am writing to you. I ask you to advise me of the following immediately:
>
> > 1. Were my clients' accounts at the facilities Osler and Assessment Direct settled? If so, please provide proof of same.
> >
> > 2. If not what attempts, if any, were made to settle the said accounts? Please provide particulars.
> >
> > 3. What efforts, if any, were made to save my clients harmless since the settlement?
>
> If I do not receive satisfactory responses by the end of Friday April 19 2013, my clients may commence proceedings against you without further notice. In the event that a claim is commenced my clients insist on adherence to the *Rules of Civil Procedure* in requiring timely pleadings. As well, we would ask for available dates for motions, cross-examinations and discoveries, if any. Please advise your counsel accordingly.

[36] On April 22, 2013, Mr. Lerman wrote Mr. Rooz and requested confirmation that actions had been commenced by Assessment Direct or Osler Rehabilitation Centre against the Plaintiffs.

[37] On April 24, 2013, Osler Rehabilitation Centre demanded payment from Mr. Bijelic and Ms. Kisel, respectively, and on April 30, 2013, Mr. Rooz provided Intact and its lawyer with a copy of the demand letter. As the fax to Mr. Lerman failed, Mr. Rooz emailed a copy again the next day.

[38] On May 9, 2013, Mr. Rooz wrote to Intact directly with respect to Ms. Kisel's situation. Mr. Rooz's letter stated:

> As I have not received a reply to my letters nor any confirmation of attempts by the insurer to save my client harmless by settling the accounts at the clinics, I have acted on instructions to commence an action. The Statement of Claim is with our process server and will be served upon you shortly after issuance.
>
> If the insurer wishes to resolve this issue my client would be pleased to discontinue the action upon such resolution with or without costs depending on timing. However, any negotiations which may take place should not be interpreted as a waiver of defence as my client insists on a timely defence pursuant to the Rules.

[39] The Statement of Claim in Ms. Kisel's action was served on May 13, 2013. In the normal course, Intact would have until June 2, 2013 to deliver a Statement of Defence or until June 12, 2013, if a Notice of Intent to Defend was delivered first.

[40] On May 28, 2013, Mr. Lerman wrote to Mr. Rooz to submit that the Hold Harmless Agreement had not been triggered. Once again, Mr. Lerman requested confirmation that Assessment Direct or Osler Rehabilitation Centre had commenced an action, and he asked the Plaintiffs to discontinue their own actions. Mr. Lerman's letter stated:

> Unfortunately, you have complicated this issue by initiating proceedings against Intact on behalf of Ms. Kisel. I would further ask that you confirm if a proceeding has also been issued on behalf of Mr. Bijelic. This step was not in accordance with the discussions held between myself, your associate and the insureds at the arbitration. However, I must now confirm that you will not require Intact to serve or file a Notice of Intent to Defend prior to delivering a Statement of Defence without providing further notice and an opportunity to clarify this issue which you have unnecessarily complicated.
>
> In my view, the agreement clearly states that the duty to hold harmless pertains to any claims initiated by Assessment Direct and Osler Rehabilitation Centre against the insureds. By initiating your own claims on behalf of the insureds you have now restricted my ability to contact them to discuss this matter without further authorization. Your actions have in effect prevented Intact from responding to any forthcoming claims that would be encompassed by the settlement.
>
> As their lawyer, you do not need to be reminded that you are obligated to protect the interests of Mr. Bijelic and Ms. Kisel. I would, therefore, again ask you to confirm if any formal action has been commenced against either insured by either Assessment Direct or Osler Rehabilitation Centre. I would also ask that you clarify if it is your intention to remain involved on their behalf or if you will facilitate the requisite meetings between myself, the insureds and representatives of their insurer in addition to the examination under oath which is necessary to preserve their evidence given their advanced age.
>
> As such, I trust that you will discontinue any actions you have initiated against Intact so that Intact may respond to any forthcoming claims. I would ask that you confirm whether you will facilitate the requisite meetings between your clients and my clients insureds or if you would permit me to proceed directly. As I have not been informed by your office or by the insureds that Assessment Direct or Osler Rehabilitation Centre have initiated proceedings, there is simply no claim to defend at this time.

[41] On May 29, 2013, by email, Mr. Rooz advised Mr. Lerman that Ms. Kisel insisted on being served with a Defence or Notice of Intent to Defend.

[42] On May 30, 2013, Intact served a Notice of Intent to Defend in Ms. Kisel's action.

[43] On June 8 2013, by email, Mr. Rooz advised Mr. Lerman that should a Statement of Defence not be served by June 12, 2013, Ms. Kisel would note Intact in default and pursue default proceedings without further notice.

[44] The Statement of Defence was not delivered, and on June 20, 2013, Intact was noted in default in the Kisel action, and on July 9, 2014, Ms. Kisel obtained a default judgment in the amount of $67,717.96, plus costs in the amount of $1,200.

[45] On August 2, 2013, an action was commenced on behalf of Mr. Bijelic, and it was served on Intact Insurance on August 7, 2013. In the normal course, Intact would have until August 27, 2013, to deliver a Statement of Defence or until September 6, 2013, if a Notice of Intent to Defend was delivered first.

[46] On August 9 2013, Mr. Rooz sent Intact's lawyers a copy of the default judgment in the Kisel action. It is a judgment for $67,717.96, plus $1,200 in costs, with postjudgment interest at 3%.

[47] The same day, Mr. Rooz wrote Mr. Lerman to advise that a Statement of Claim had been issued for Mr. Bijelic and that the Statement of Claim had been served on Intact on August 7, 2013. Once again, Mr. Lerman was told that a timely Statement of Defence was required, failing which Intact would be noted in default and Mr. Bijelic would requisition a default judgment.

[48] On September 18, 2013, Mr. Lerman wrote Mr. Rooz to reiterate that neither Plaintiff has a tenable claim against Intact because no action had been initiated against them to trigger the Hold Harmless Agreement. He demanded that the default judgments be set aside. Mr. Lerman's letter stated:

> Moreover, it has come to my attention that despite being served with a Notice of Intent to Defend on or about May 30, 2013, you have proceeded to obtain an order for default judgment against the Intact Insurance Company regardless. While it is not known whether or not you brought the Notice of Intent to Defend to the Court's attention when obtaining your order, we will nevertheless be bringing a motion before the Court to have this Order set aside and to seek Summary Judgment accordingly.
>
> I trust that you will provide us with your availability for such a motion date by no later than September 30, 2013, failing which we will proceed to schedule the motion unilaterally.

[49] On September 23, 2013, Mr. Rooz informed Intact's lawyers that Intact had been noted in default in the Bijelic action and that any motion to set aside the defaults should be heard at the same time as a motion for summary judgment.

[50] After September 23, 2013, the parties brought their respective motions and cross-motions, and for present purposes, it is not necessary to describe the various attendances and procedural steps that led the parties to having a long motion scheduled and eventually heard on August 11, 2014.

[51] During the argument of the motion, Ms. Kisel's and Mr. Bijelic's lawyer stated that if Intact paid the judgments, Ms. Kisel and Mr. Bijelic would undertake to remit the moneys that they owed to Assessment Direct and Osler Rehabilitation Centre

## D. DISCUSSION AND ANALYSIS

[52] There is no plausible excuse for Intact's default in complying with the *Rules of Civil Procedure*.

[53] Intact was repeatedly told and warned that Ms. Kisel's and Mr. Bijelic's instructions were to require strict compliance with the Rules. There was nothing unfair in the Plaintiffs requiring

strict compliance with the time limits of the *Rules*, and there was no reason why Intact's lawyers needed more time to investigate the matter and to take instructions about how to defend the Kisel and Bijelic claims.

[54] There is an explanation for Intact's default, but it does not provide a plausible excuse for not complying with the *Rules of Civil Procedure*.

[55] Intact's explanation rests in the superstitious stubbornness that its interpretation of the Hold Harmless Agreement was the correct one, which may or may not be the case. But whatever the merits of that interpretation, within days of the signing of the agreement, Intact knew that Ms. Kisel and Mr. Bijelic had a different interpretation.

[56] Thus, there was no purpose in Intact debating the point and delaying the delivery of a Statement of Defence in a dispute about how the Hold Harmless Agreement operated. The best way for Intact to assert its position as against Ms. Kisel and Mr. Bijelic was to assert it by delivering a Statement of Defence. In other words, Intact's explanation for not complying with the *Rules* does not provide a reasonable excuse for not delivering a timely Statement of Defence.

[57] Ironically, Intact's stubbornness and its tardiness in responding to Mr. Rooz's initial correspondence seems to have blinded it to the fact that it did not need Ms. Kisel's and Mr. Bijelic's permission to deal directly with Assessment Direct and Osler Rehabilitation Centre and, in any event, the Plaintiffs obviously were giving permission by asking Intact to contact the service providers to deal with the matter of the invoices.

[58] By August, when there was already a default judgment for Ms. Kisel, there is no excuse and no explanation as to why Intact would not deliver a Statement of Defence in the Bijelic action promptly.

[59] Intact would have suffered no prejudice by delivering the Defence that it knew it had from the outset. Intact's real foe is not the Plaintiffs, whom it had agreed to hold harmless, but the foe is Assessment Direct and Osler Rehabilitation. By the court refusing to set aside the default judgment and the noting in default, Intact still has its action against the service providers and wants only for having the assistance of the 75-year old Ms. Kisel and the 87-year old Mr. Bijelic, who are just pawns in a dispute not of their making.

[60] The elderly Plaintiffs are far more prejudiced by the court granting Intact an indulgence than Intact would be prejudiced by the court refusing to set aside the noting of default and the default judgment. In the particular and usual circumstances of these cases, it would not be just to relieve Intact from the consequences of its failure to comply with the *Rules of Civil Procedure*.

## E. CONCLUSION

[61] For the above reasons, I dismiss all the motions.

[62] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for Decision followed by Intact's submissions within a further 20 days.

_____

Perell, J.

Released: August 18, 2014

**CITATION:** Kisel v. Intact Insurance Company, 2014 ONSC 4787
**COURT FILE NO:** CV-13-480034
**COURT FILE NO:** CV-13-486195
**DATE:** 20140818



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

YAROSLAVA KISEL

Plaintiff

**– and –**

INTACT INSURANCE COMPANY

Defendant

**AND BETWEEN:**

RADE BIJELIC

Plaintiff

**- and -**

INTACT INSURANCE COMPANY

Defendant

---

**REASONS FOR DECISION**

---

PERELL J.

Released: August 18, 2014