

CITATION: Old Republic Insurance Company of Canada v. Gurshan Trucking Inc., 2024
ONSC 448
COURT FILE NO.: CV-22-00676837-0000
DATE: 20240119

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
 OLD REPUBLIC INSURANCE) *David A. Zuber* for the Plaintiff
 COMPANY OF CANADA)
)
 Plaintiff)
)
 - and -)
)
 GURSHAN TRUCKING INC., 6591850) *Tarunjeet Gujral* for the Defendants
 CANADA INC. and MUKHTAR)
 DHALIWAL SINGH)
)
 Defendants) **HEARD:** January 15, 2024

2024 ONSC 448 (CanLII)

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] In this simplified procedure action, in 2022, the Plaintiff, Old Republic Insurance Company of Canada sued the Defendants, Gurshan Trucking Inc., 6591850 Canada Inc., and Dhaliwal Singh for \$60,000. When the Defendants did not defend, Old Republic noted them in default. In 2023, Old Republic moved for a default judgment, and it brought a motion to amend the Statement of Claim to assert a claim of \$200,000, the monetary limit of a simplified procedure claim. The Defendants were served with the motion to amend, and they brought a motion to set aside the noting of default.

[2] For the reasons that follow, I grant both motions. In brief, there is no reason not to grant leave for Old Republic to amend its claim, but there is good reason to set aside the noting of default to allow the Defendants to defend the \$200,000 action on its merits.

[3] Although Old Republic's resistance to the setting aside of the noting in default was initially justified, it became less so when it was the party that was seeking leave to reopen the pleadings to increase the quantum of its claim. There was no delay in the Defendants responding to the motion to increase the quantum of the claim. In light of the proposed revised pleading, it is an arid debate about whether the Defendants had defaulted in their right to defend a \$60,000 claim of which they

had notice.

[4] Old Republic's focus on the allegedly incredulous and unreliable evidence of Mr. Singh and on the weakness of the Defendants' defence was misplaced because on a motion to set aside a noting in default, the merits of the defence is just one of a number of factors that the court must weigh. In the immediate case, the Defendants did not delay in seeking to defend the \$200,000 claim, and it is purposeless to decide whether the Defendants have an excuse for their failure to defend a \$60,000 claim. It is simply not in the interests of justice to deny the Defendants an opportunity to defend the \$200,000 claim. The alleged weakness of the Defendants' defence on the merits is a matter for a summary judgment motion or a defended trial.

B. Facts

[5] Old Republic issued an automobile insurance policy to the defendant Gurshan Trucking Inc., which carries on business of logistics and commercial trucking. Mr. Singh testified that Gurshan Trucking was owned by his wife.

[6] The policy for Gurshan Trucking covered a 2006 Volvo White 670 VNL tractor, which was owned by the defendant 6591850 Canada Inc., which operated a logistics and commercial trucking business at the same address as Gurshan Trucking. The Defendant Mukhtar Dhaliwal Singh is a director of both companies.

[7] Old Republic's policy of insurance contains a provision entitling the insurer to recover payments if the insured was driving under the influence of drugs or alcohol or convicted of certain crimes relating to the operation of a motor vehicle. More precisely, pursuant to the standard Ontario Automobile Policy OAP 1, section 7.2.2 and section 7.4.2, the policy provides as follows:

7.2.2 Illegal Use

We won't pay for loss or damage caused in an incident:

- if you are unable to maintain proper control of the automobile because you are driving or operating the automobile while under the influence of intoxicating substances;
- if you are convicted of one of the following offenses under the *Criminal Code* of Canada relating to the operation, care, or control of the automobile, or committed by means of an automobile, or any similar offence under any law in Canada or the United States:
 - causing death by criminal negligence
 - causing bodily harm by criminal negligence
 - dangerous operation of motor vehicles
 - failure to stop at the scene of an accident
 - operation of motor vehicle when impaired or with more than 80 mg of alcohol in the blood
 - refusal to comply with demand for breath sample
 - causing bodily harm during operation of vehicle while impaired or over 80 mg of alcohol in the blood, or
 - operating a motor vehicle while disqualified from doing so;

- if you use or permit the automobile to be used in a race or speed test, or for illegal activity;
- if you drive the automobile while not authorized by law; and
- if another person, with your permission, drives or operates the automobile under any of these conditions

[...]

7.4.2 *Foregoing Our Right to Recover*

If someone else is using a described automobile with your permission when an insured loss occurs, we will pay for the resulting claim. We will also forego our right to recover the money from that person. However, we will keep the right to recover payment:

- if the person has the automobile in connection with the business of selling, repairing, maintaining, storing, servicing or parking automobiles; or
- if the person using the automobile violates any condition of this policy, or operates it in circumstances referred to in 7.2.2.

[8] In his youth, Mr. Singh suffered a sporting injury to his back for which he was prescribed Tylenol 3 as a pain medicine. However, the pain persisted, and he was prescribed methadone to be taken as needed. There is inconsistent unreliable evidence about if and when Mr. Singh may have ingested methadone in February 2020.

[9] On **February 14, 2020**, Mr. Singh was driving the 2006 Volvo White 670 tractor on Highway 401 on the return leg of a trip to Montreal. The weather conditions were bad, and unfortunately, there was a collision between the vehicle being driven by Mr. Singh and another vehicle, a tractor trailer parked on the roadside. It is alleged that at the time of the accident, Mr. Singh was impaired because he had taken methadone. Mr. Singh says that he was not impaired and that he was only taking his medication as prescribed.

[10] Mr. Singh suffered significant injuries in the accident. He was hospitalized. He did not recover to resume work for almost one year.

[11] After the accident, Old Republic paid the statutorily required no-fault personal injury benefits. Pursuant to the insurance policy, Old Republic paid : (a) \$31,679.55 to tow the vehicle; (b) \$8,000 to CLE Capital, the lessor of the vehicle; (c) \$5,456.25 to the Ministry of Transportation for expenses associated with the accident; (d) \$88,308.24 for property damage to the other vehicle involved in the accident. The total amount paid was \$133,444.04.

[12] On **July 27, 2021**, Mr. Singh pled guilty to one count of dangerous driving contrary to s. 320.12 of the *Criminal Code* with respect to the accident. The impaired driving charge was withdrawn based on medical evidence submitted by Mr. Singh. The sentence was a conditional discharge with driving prohibition.

[13] Old Republic alleges that in applying for insurance benefits, Mr. Singh under oath misrepresented that: (a) he was not intoxicated at the time of the accident; (b) he had not consumed any drugs or alcohol within 12 hours of the accident; and (c) there were no pending or ongoing criminal charges or investigations as a result of the accident.

[14] Old Republic alleges that as a result of the criminal conviction of Mr. Singh, pursuant to sections 7.2.2 and 7.4.2 of its insurance policy, it is entitled to recovery from the Defendants all

money it paid in respect of property damage caused by the accident. Old Republic submits that the Defendants are contractually obligated to reimburse it for any payments made in relation to the insured loss because the Defendants breached the insurance policy and misrepresented their claim for insurance.

C. Procedural History

[15] On **February 11, 2022**, pursuant to the simplified procedure, Old Republic sued the Defendants for \$60,000 to recover what it had paid in respect of the insurance policy coverage.

[16] On **February 17, 2022**, the Defendants were served with the Statement of Claim by an alternative to personal service. Three copies of the pleading were left with one Kulbir Kaur at 7808 Wildfern Dr., the mailing address for the Defendants. Three copies were also mailed to that address.

[17] Mr. Singh testified that he sent the Statement of Claim to Jewell Radimisis Jorge LLP to defend the claim. The firm had already been retained for Mr. Singh's personal injury claim. Mr. Singh testified that he expected that the firm would deal with the claim appropriately. Under cross-examination, Mr. Singh's evidence on this point was an example of many examples where his evidence is unreliable, and it may be that his personal injury lawyers were never informed about Old Republic's claim or that defending an insurer's action was not part of their retainer.

[18] For reasons that I shall explain below, I need not decide what was the role, if any, of Jewell Radimisis Jorge LLP to the circumstances that the Defendants did not respond to the Statement of Claim.

[19] On **September 12, 2022**, Old Republic wrote each of the Defendants and the letter was personally served on them on **September 17, 2022**. Mr. Singh was also served by alternative to personal service that day. The letter warned that the Defendants would be noted in default if they did not defend the action.

[20] On **October 14, 2022**, Old Republic had each defendant noted in default.

[21] Mr. Singh blames his personal injury lawyers for the Defendants' failure to defend.

[22] I pause here to say that there is no evidence from that law firm before the court and as foreshadowed above, I need not much explore why the Defendants did not defend the \$60,000 claim.

[23] Old Republic then brought a motion for default judgment and on **March 30, 2023**, Justice Papageorgiou ordered that the motion be served on the Defendants.

[24] On **April 12, 2023**, Old Republic brought a motion for an Order amending the statement of claim to increase the prayer for relief to \$200,000.00 against the Defendants for \$133,444.04. The motion was supported by the affidavit dated April 12, 2023 of Irena Maychak, Ms. Maychak is a Senior Claims Adjuster at Old Republic.

[25] At this point in the procedural history, it is pertinent to note that a defendant is entitled to notice of a motion to amend the statement of claim notwithstanding that the defendant may have been noted in default. Rule 19.02 (3) of the *Rules of Civil Procedure*¹ states:

¹ R.R.O. 1990, Reg. 194.

19.02 (3) Despite any other rule, a defendant who has been noted in default is not entitled to notice of any step in the action and need not be served with any document in the action, except where the court orders otherwise or where a party requires the personal attendance of the defendant, and except as provided in,

(a) subrule 26.04 (3) (amended pleading);

[...]

[26] It is also worth noting that at least for a defendant who has defended the action, if the plaintiff is granted leave to amend its statement of claim, the pleadings are reopened and the defendant has an opportunity to replead its defence; see rule 26.05.

[27] On **May 5, 2023**, Tarunjeet S. Gujral, the Defendants' new lawyer, wrote to counsel for Old Republic to advise of a potential retainer on behalf of the Defendants.

[28] The default judgment motion was cancelled, and on **May 15, 2023**, the court wrote to counsel for the parties to advise that a case conference was scheduled for July 24, 2023.

[29] On **July 24, 2023**, there was a case conference, and I scheduled January 15, 2024 for the parties' motions.

[30] The Defendants brought their motion to set aside the noting in default. Their motion was supported by the affidavit of Mr. Singh dated August 4, 2023. The Defendants proffered a draft Statement of Defence setting out their defence on the merits.

[31] On **October 31, 2023**, Mr. Singh was cross-examined.

D. Discussion and Analysis

[32] Rule 26.01 provides: “[o]n motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.” The rule is mandatory, and amendments must be allowed unless the responding party can demonstrate prejudice that cannot be compensated by costs.² Increasing the amount of the damages claimed is not prejudicial, and the mere fact that an amendment substantially increases the quantum of damages is not a basis to deny an amendment.³

[33] In the immediate case, there is no reason to refuse the amendment. The Defendants did not oppose the amendment and they wished to defend the \$200,000 claim. Old Republic's motion is granted without costs.

[34] Turning to the Defendants' motion for setting aside a noting in default, the major relevant factors are whether the defendant brought his or her motion without undue delay and whether he or she explains why there was a default. Where there is no default judgment, satisfying just these

² *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.); *King's Gate Developments Inc. v. Drake* (1994), 17 O.R. (3d) 841 (C.A.).

³ *Gayle v. Cambridge Mercantile Corp.*, 2023 ONSC 3554; *Beals v. Saldanha* (2001), 54 O.R. (3d) 641 (C.A.), aff'd 2003 SCC 72; *Hill v. Church of Scientology of Toronto* (1992), 7 O.R. (3d) 489 (Gen. Div.), aff'd (1994), 18 O.R. (385 (C.A.); aff'd [1995] 2 S.C.R. 1130.

two factors is usually sufficient to justify setting aside the noting of a defendant in default.⁴

[35] A third relevant factor is whether the defendant can show a defence on the merits. In general, without being exhaustive, the following factors are relevant in considering whether to set aside a defendant being noted in default: (a) the parties' behaviour, (b) the length of the delay; (c) the reasons for the delay; (d) the complexity and value of the claim; (e) whether a party relying on the notice of default would be prejudiced; (f) the balance of prejudice as between the parties; (g) and whether the defendant has an arguable defence on the merits.⁵

[36] However, to set aside just the noting in default, only in extreme circumstances of default and delay is a defendant required to show a defence on the merits.⁶ Thus, the test that the defendant must meet to set aside the noting in default is lower than the test for setting aside a properly obtained default judgment, which test includes the element that the defendant show a defence on the merits.⁷ Motions to set aside a noting of default are frequently granted because it is typically not in the interest of justice to grant judgments based solely on technical defaults, and courts prefer to dispose of proceedings on their merits whenever possible.⁸

[37] As I foreshadowed in the Introduction to these Reasons for Decision, the Defendants promptly indicated an intention to defend the \$200,000 claim. They did not dispute that they had been served with the \$60,000 Statement of Claim and they provided excuses for their delay in defending the \$60,000 Statement of Claim. In the main excuses, Mr. Singh professed unsophistication with the English language, ignorance of court procedures, and misplaced reliance on his former lawyers.

[38] Under vigorous cross-examination, Mr. Singh was pounded about the excuses for not defending the \$60,000 action and about his medical condition before and after the highway traffic accident and about the causes of that accident. Whether from being intellectually overmatched, or from being ill-prepared or from nervousness, Mr. Singh performed poorly in aid of his own case. Old Republic submitted that Mr. Singh's evidence was not worthy of being given any weight.

[39] There is no doubt that Mr. Singh was a very poor witness. There are numerous instances of inconsistency, contradiction, retraction, confusion, circumlocution, dodginess, speculation, and implausibility in his answers to questions. He was not up to the task of resisting a formidable cross-examiner, but I would not go so far as to discount all of his evidence. Moreover, for present purposes, it is not necessary for me to make any findings about Mr. Singh's credibility and about his testimony about the ultimate merits of the Defendants' defence to a claim that with interest will likely reach the current monetary limit for simplified procedure claims.

[40] A monetary significant claim is being advanced by Old Republic against all the

⁴ *CLE Capital Inc. v. 2593485 Ontario Ltd.*, 2022 ONSC 4299 (Assoc. J.); *Black v. Hutton*, 2019 ONSC 6230; *Ali v. Gonzales*, 2019 ONSC 4887; *Intact v. Kisel*, 2015 ONCA 205; *Bank of Montreal v. Rich*, [1985] O.J. No. 1848 (Dist. Ct.); *Wieder v. Williams* (1976), 13 O.R. (2d) 528 (Master).

⁵ *Franchetti v. Huggins*, 2022 ONCA 111.

⁶ *Franchetti v. Huggins*, 2022 ONCA 111; *Intact v. Kisel*, 2015 ONCA 205; *Benlolo v. Barzakay*, [2003] O.J. No. 602 (Div. Ct.); *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (1991), 3 O.R. (3d) 278 (C.A.).

⁷ *Metropolitan Toronto Condominium Corporation No. 706 v. Bardmore Developments Ltd.* (1991) 3 O.R. (3d) 278 (C.A.); *Axton v. Kent* (1991), 2 O.R. (3d) 797 (Div. Ct.).

⁸ *Czuczman Estate v. St. Demetrius (Ukrainian Catholic) Development Corporation*, 2016 ONSC 964 at para. 20 (Master); *Speck v. Alma Mater Society of Queen's University Inc.*, 2015 ONSC 137 at para. 14; *Garten v. Kruk*, [2009] O.J. No. 4438 at para. 16 (Div. Ct.); *Nobosoft Corporation v. No Borders Inc.*, 2007 ONCA 444 at para. 7.

Defendants. There is no doubt that the Defendants responded promptly when Old Republic tripled the amount originally claimed to advance this monetarily significant claim. In these circumstances, I need not come to any conclusion about whether they have an excuse for not defending the original claim. With respect to the claim that is being advanced, it remains to be seen whether some or all of the Defendants may be able to mount a defence. In my opinion, the appropriate Order in the immediate case is to set aside the noting in default.

[41] Apart from paying for the costs that have been wasted, I set aside the noting in default without imposing terms.

[42] The pleadings should be completed based on the amended Statement of Claim. It will be for the Plaintiff to decide whether to move for a summary judgment or to proceed to discoveries or to simply set the matter down for trial.

[43] The Plaintiffs shall have its costs for both motions, which I fix at \$7,500, all inclusive, payable within sixty days.

[44] Order accordingly.

E. Conclusion

[45] For the above reasons, both motions should be granted.

Perell, J.

Released: January 19, 2024

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BETWEEN:

**OLD REPUBLIC INSURANCE
COMPANY OF CANADA**

Plaintiff

and –

**GURSHAN TRUCKING INC., 6591850 CANADA
INC. and MUKHTAR DHALI WAL SINGH**

Defendants

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