STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

PROFESSIONAL SOLUTIONS
INSURANCE COMPANY,

Plaintiff,

vs.

MARC E. CURTIS; CURTIS,
NORTON & ASSOCIATES, PLLC;
and JOHN KAILUNAS II,

Defendants.
_____/

Case No. 16-02642-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

This insurance-coverage dispute is the downstream result of litigation in which Defendant John Kailunas II suffered a million-dollar judgment based upon a default followed by a bench-trial verdict. In the wake of that devastating outcome, Kailunas filed a legal-malpractice action against his attorney, Defendant Marc Curtis, as well as Attorney Curtis's law firm, Defendant Curtis, Norton & Associates ("CN"). Attorney Curtis and his law firm apparently sought insurance coverage from Plaintiff Professional Solutions Insurance Company ("PSIC"), which responded by filing the instant case requesting a declaratory judgment that PSIC has no duty to defend or indemnify Attorney Curtis or his law firm. With the underlying legal-malpractice action pending, PSIC filed a motion seeking summary disposition under MCR 2.116(C)(10) on the questions of its duty to defend and indemnify Attorney Curtis and his firm. Because the Court concludes that PSIC has the legal right to rescind the insurance policy and that the policy does not cover Attorney Curtis or his firm with regard to the claims asserted by Kailunas, the Court must award summary disposition to PSIC.

I. Factual Background

Plaintiff PSIC has moved for summary disposition under MCR 2.116(C)(10),[1] which allows the Court to consider "affidavits, pleadings, depositions, admissions and other evidence submitted by the parties[.]" Maiden v Rozwood, 461 Mich 109, 120 (1999). Therefore, the Court may review the entire record developed by the parties in deciding PSIC's request for summary disposition. But "[w]hether an insurance carrier has a duty to defend its insured in an underlying tort action depends upon the allegations in the complaint" in that underlying case, Fitch v State Farm Fire and Casualty Co, 211 Mich App 468, 471 (1995), so the Court shall first consider the allegations in the complaint in the underlying case, styled as Kailunas v Curtis, 17th Circuit Ct Case No 16-00959-NM, and then turn to the record developed by the parties in the instant case.

Beginning in 2013, Defendant Curtis represented Defendant Kailunas in a matter that came to be known as Legacy Capital Partners, LLC v Kailunas, 17th Circuit Ct Case No 13-09947-CKB. In the flow of that litigation, Kailunas and his company, Regal Investment Advisors, LLC ("Regal"), were the subjects of a cross-claim filed on March 28, 2014. Attorney Curtis failed to file a timely answer to that cross-claim, so the Clerk of the Court entered a default against Kailunas on May 13, 2014. See Exhibit C, Attached. Although Attorney Curtis subsequently filed a motion on May 30, 2014, to set aside the default, the Court denied that motion on June 13, 2014, and thereby established liability as a matter of law against Kailunas. See Kalamazoo Oil Co v Boerman, 242 Mich App 75, 79 (2000), quoting Wood v DAIIE, 413 Mich 573, 578 (1982). In time, the Court conducted a bench trial on damages and then rendered a verdict against Kailunas in the amount of $1,140,595.90 on the cross-claim on December 15, 2015, without Kailunas putting up a fight on liability.

[1] Defendant Kailunas also has requested summary disposition under MCR 2.116(C)(10).

That enormous verdict against Defendant Kailunas prompted him to file a legal-malpractice suit against Attorney Curtis and others on February 1, 2016. That case, styled as Kailunas v Curtis, 17th Circuit Ct Case No 16-00959-NM, remains pending before the Honorable Dennis B. Leiber in the Kent County Circuit Court. Faced with that lawsuit, Attorney Curtis turned to Plaintiff PSIC for defense and indemnity, but PSIC then filed the instant case on March 23, 2016, seeking declaratory relief concerning the duty to defend and the duty to indemnify Curtis and his law firm. According to PSIC, Curtis applied for professional insurance on May 5, 2014, see Complaint, Exhibit B, in the midst of dealing with the default against Kailunas, but Curtis failed to disclose his potential liability for legal malpractice that arose from his representation of Kailunas. Although PSIC issued a policy to Curtis and his firm with a coverage period retroactive to May 6, 2014, see Complaint, Exhibit C, PSIC now insists that it has the legal right to rescind that policy because Curtis failed to disclose his potential liability for malpractice in his representation of Kailunas. Moreover, PSIC insists that any claim against Curtis and his firm for work on behalf of Kailunas falls outside the coverage period, so PSIC has no duty to defend or indemnify Curtis in his litigation with Kailunas. Based upon those two theories, PSIC has requested summary disposition under MCR 2.116(C)(10).

II. Legal Analysis

Plaintiff PSIC's motion for summary disposition under MCR 2.116(C)(10) must be granted if, but only if, "the proffered evidence fails to establish a genuine issue regarding any material fact." Maiden, 461 Mich at 120. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003). PSIC has two separate theories

in support of its request for summary disposition. First, PSIC contends that it has the legal right to rescind the policy issued to Defendant Curtis and his firm because of a material misrepresentation in the application submitted by Curtis's firm on May 5, 2014. Second, PSIC asserts that the policy period does not cover Defendant Kailunas's claims against Curtis. The Court shall address these two arguments in turn.

A. The Right to Rescind the Policy.

To obtain the policy issued by Plaintiff PSIC, Defendant Curtis and his firm had to complete a relatively straightforward four-page application. That application, dated May 5, 2014, includes the following question:

> After inquiry of all lawyers and employees of the law firm, including independent contractors, Of Counsel and any other affiliated lawyers, is any such person aware of [a]n act or omission that might reasonably be expected to be the basis of a claim?

See Complaint, Exhibit B (Short Form New Business Application at 2 of 4). The application from Curtis and his firm contains the response box checked for "No." Id. PSIC maintains that Curtis and his firm knew – or certainly should have known – that the failure to file a timely answer to the cross-claim on behalf of Defendant Kailunas "might reasonably be expected to be the basis of a claim[.]" See id. As a result, PSIC has the legal right to rescind the policy issued to Curtis and his firm.

Under Michigan law, "an insurer may rescind an insurance policy and declare it void *ab initio* where such policy was procured through the insured's intentional misrepresentation of a material fact in the application for insurance." Auto-Owners Ins Co v Commissioner of Insurance, 141 Mich App 776, 780 (1985); see also Montgomery v Fidelity & Guaranty Life Ins Co, 269 Mich App 126, 129 (2005). Also, a "representation in an application is 'material' where communication of it would have

had the effect of 'substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium.'" Oade v Jackson Nat'l Life Ins Co, 465 Mich 244, 253-254 (2001). Neither the nature of the misrepresentation nor its materiality raises a genuine issue of material fact in the instant case.

In the week leading up to the submission of the application for insurance by Defendant Curtis and his firm on May 5, 2014, the following events occurred. First, on April 28, 2014, the attorney for the plaintiffs who filed the cross-claim against Defendant Kailunas submitted a request for the entry of a default against Kailunas.[2] See Exhibit A, Attached. Second, one day later, on April 29, 2014, Curtis signed and filed a "Certificate of Service" stating that "he electronically submitted for e-filing Cross-Defendant John A. Kailunas, II Answer" to the cross-claim. See Exhibit B, Attached. Third, on May 30, 2014, Curtis filed a motion to set aside the default against Kailunas on the cross-claim, conceding that he "was notified on April 29, 2014, of the request for entry of Default against Cross-Defendant" Kailunas. See Exhibit C, Attached. Despite all of those events, when Curtis and his firm filed the application for professional insurance just six days later, they checked the box that stated that nobody in the firm was aware of "[a]n act or omission that might reasonably be expected to be the basis of a claim[.]" See Complaint, Exhibit B (Short Form New Business Application at 2 of 4). Given the timing of events, that answer is a textbook example of a misrepresentation in the process of applying for insurance coverage. Therefore, if that misrepresentation was material, PSIC has the right under Michigan law to rescind the professional insurance policy that it issued to Curtis and his firm.

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[2] The Court has obtained each of the documents discussed in this paragraph from the Court's electronic docket in Legacy Capital Partners, LLC v Kailunas, 17th Circuit Ct No 13-09947-CKB. For ease of reference, each of the documents will be attached to this opinion.

With respect to the materiality of the misrepresentation, "the undisputed evidence presented to the trial court ma[kes] clear that the correct information would have led the insurer to charge an increased premium, hence a different contract." See Oade, 465 Mich at 254. Indeed, the Assistant Director of Underwriting for Plaintiff PSIC has submitted an affidavit that states:

> Had CN responded "Yes" to the question in the application that asked whether the applicant was aware of any act or omission which might reasonably be expected to be the basis of a claim, and had CN, as required by the application, disclosed the circumstances surrounding the crossclaim that had been asserted against Kailunas in the 2013 litigation, in an Incident/Claim Supplement form, PSIC would not have agreed to issue the policy in question due to the underwriting ineligibility and/or it would have . . . placed an exclusion on the policy specifically excluding coverage for any claim that might result against Marc Curtis or his firm resulting from his failure to answer the crossclaim in timely fashion.

See Plaintiff PSIC's Motion for Summary Disposition, Exhibit F (Affidavit of Rebecca Finneran, ¶ 6). This is precisely the type of evidence that our Supreme Court treated as conclusive on the issue of materiality in Oade, 465 Mich at 254, so it plainly suffices to establishes materiality here. Thus, the Court shall grant summary disposition to PSIC under MCR 2.116(C)(10) insofar as PSIC seeks to rescind the professional insurance policy issued to Curtis and his firm effective May 6, 2014.

B. Coverage Under the Policy.

Even assuming, *arguendo*, that Plaintiff PSIC has no right to rescind the insurance policy that it issued to Defendant Curtis and his firm, the Court agrees with PSIC that Curtis and his firm have no right to coverage under the policy for any of Defendant Kailunas's claims in the underlying case. Michigan recognizes a duty to defend and a duty to indemnify in the insurance context. Although "the duty to defend is broader than the duty to indemnify[,]" American Bumper and Manufacturing Co v Hartford Fire Ins Co, 452 Mich 440, 450 (1996), "[t]he duty to defend is related to the duty to

indemnify in that it arises only with respect to insurance afforded by the policy." Id. Consequently, "[i]f the policy does not apply, there is no duty to defend," id., and necessarily no duty to indemnify either. "An insurance policy is similar to any other contractual agreement, and, thus, the court's role is to 'determine what the agreement was and effectuate the intent of the parties.'" Hunt v Drielick, 496 Mich 366, 372 (2014). Interpretation of an insurance policy "requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage." Auto-Owners Ins Co v Harrington, 455 Mich 377, 382 (1997). "While '[i]t is the insured's burden to establish that his claim falls within the terms of the policy,' '[t]he insurer should bear the burden of proving the absence of coverage.'" See Hunt, 496 Mich at 373. Although exclusionary clauses in insurance policies "'are strictly construed in favor of the insured[,]'" id., "'[i]t is impossible to hold an insurance company liable for a risk it did not assume,'" id., so "'[c]lear and specific exclusions must be enforced.'" Id. These principles govern the Court's interpretation of the professional insurance policy at issue here.

In large, bold typeface, the professional insurance policy at issue here states that it provides coverage "**ONLY FOR ACTS OR OMISSIONS WHICH OCCURRED ON OR AFTER ANY APPLICABLE RETROACTIVE DATE.**" See Complaint, Exhibit C (policy title page). And the policy itself plainly and repeatedly identifies its retroactive date as May 6, 2014. See id., Exhibit C. The claims asserted by Defendant Kailunas against Defendant Curtis and his firm rest upon events concerning the cross-claim against Kailunas. The Court has previously reviewed the chronology of acts leading to the default on the cross-claim, and that review leaves no doubt whatsoever that every misstep of consequence occurred prior to May 6, 2014. To be sure, the default was not entered by the clerk until May 13, 2014, see Exhibit C, Attached, but MCR 2.603(A)(1) requires the entry of

a default once the time for filing an answer passes without the submission of that document. Indeed, as MCR 2.603(A)(1) indicates: "If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk ***must*** enter the default of that party." Thus, when the default request was submitted on April 28, 2014, see Exhibit A, Attached, entry of the default against Kailunas was inevitable. For that reason, the acts and omissions supporting Kailunas's claims necessarily occurred before the retroactive date of the policy, *i.e.*, May 6, 2014. Therefore, PSIC is entitled to summary disposition under MCR 2.116(C)(10) on its request for a declaratory judgment that Kailunas's claims against Curtis and his firm fall outside the coverage period under the policy at issue.

III. Conclusion

This is a simple dispute that Plaintiff PSIC is entitled to win for two reasons. First, a material misrepresentation in the application for the PSIC insurance policy permits PSIC to rescind the policy. Second, under the terms of that policy, PSIC has no duty to defend or to indemnify Defendant Curtis and his firm with respect to claims made against them by Defendant Kailunas in the underlying civil action. Thus, the Court invites PSIC to submit a proposed declaratory judgment under the seven-day rule, see MCR 2.602(B)(3), that memorializes these rulings and closes the case.[3]

IT IS SO ORDERED.

Dated: September 6, 2017

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[3] The proposed declaratory judgment should include the resolution of Defendant Kailunas's counterclaims for declaratory relief and specific performance concerning insurance coverage.

Exhibit A: Application for Default

Approved, SCAO

Original - Court
1st copy - Applicant
Copies - All other parties

STATE OF MICHIGAN JUDICIAL DISTRICT 17th JUDICIAL CIRCUIT	DEFAULT REQUEST, AFFIDAVIT, AND ENTRY	CASE NO. 13-09947-CKB

Court address
180 Ottawa Avenue NW, Grand Rapids, MI 49503

Court telephone no.
(616) 632-5220

Plaintiff name(s), address(es), and telephone no(s).		Defendant name(s), address(es), and telephone no(s).
Cross-Plaintiffs: Legacy Partners, LLC and Matthew Erickson	v	Cross-Defendant: John A. Kailunas, II
Plaintiff attorney, bar no., address, and telephone no. Jill A. Bankey (P48202) Siegel, Greenfield, Hayes & Gross P.L.C. One Towne Square, Suite 1835 Southfield, MI 48076 (248) 263-3514		Defendant attorney, bar no., address, and telephone no. Dirk Marinus Roskam (P62988) 28 W. Central Blvd., Fl. 4 Orlando, FL 32801 (321) 402-9545

Party in default: Cross-Defendant John A. Kallunas, II

REQUEST AND AFFIDAVIT

1. I request the clerk to enter the default of the party named above for failure to plead or otherwise defend as provided by law.

2. The defaulted party is not an infant or incompetent person

3. ☐ It is unknown whether the defaulted party is in the military service. ☒ The defaulted party is not in the military service.
☐ The defaulted party is in the military but there has been notice of pendency of the action and adequate time and opportunity to appear and defend has been provided. Attached, as appropriate, is a waiver of rights and protections provided under the Servicemembers Civil Relief Act. Facts upon which this conclusion is based are: (specify)

4. This affidavit is made on my personal knowledge and, if sworn as a witness, I can testify competently to the facts in this affidavit.

Jill A. Bankey
Applicant/Attorney signature

P48202
Bar no.

Subscribed and sworn to before me on April 28, 2014 (Date), Oakland County, Michigan.

My commission expires: 5/25/17 (Date) Signature: Susan L Harris
Deputy court clerk/Notary public Susan L. Harris

Notary public, State of Michigan, County of Wayne, acting in Oakland

NOTE: Default can be entered by a district court clerk without the request of a party.

DEFAULT ENTRY

The default of the party named above for failure to plead or otherwise defend is entered.

Date

Court clerk

CERTIFICATE OF MAILING

I certify that on this date copies of this default were served on the appropriate parties or their attorneys by first-class mail addressed to their last-known addresses as defined by MCR 2.107(C)(3).

Date

Signature

MCL 32.517, MCL 600.2441, MCL 600.5759, MCR 2.603, 50 USC 521

Exhibit B: Certificate of Service

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

HAWKPEAK, LLC, A Michigan limited liability company,

Plaintiff,

Hon. Christopher P. Yates

Case No. 13-09947-CKB

V

LEGACY CAPTIAL PARTNERS, LLC, a Michigan limited liability company; MATTHEW ERICKSON, an individual and JOHN A. KAILUNAS, II, an individual,

Defendants,

And

LEGACY CAPITAL PARTNERS, LLC A Michigan limited liability company; MATTHEW ERICKSON, an individual,

Counter-Plaintiff/Cross-Plaintiffs/ Third-Party Plaintiffs,

v.

JOHN A. KAILUNAS II, an individual,

Cross-Defendant

And

REGAL INVESTMENTS ADVISORS, LLC, a Michigan limited liability company, and RALPH W. ALLEN JR., an individual,

Third Party Defendants.

Thomas M. Wardrop (P38268)
Wardrop & Wardrop, P.C.
Attorneys for Plaintiff
300 Ottawa N.W., Suite 150
Grand Rapids, Michigan 49503
(616) 459-1225

Dirk M. Roskam(P62988)
Fowler, O'Quinn, Feeney & Sneed, P.A.
Attorneys for John A. Kailunas, II/Regal
2462 Plainfield Ave, N.E.
Grand Rapids, Michigan 49505
(616) 827-1267

SIEGEL, GREENFIELD, HAYES 7 GROSS P.L.C.
Jill A. Bankey (P48202)
One Town Square, Suite 1835
Southfield, Michigan 48076
(248) 263-3514

WISE & WISE P.L.C.
Russell R. Wise (P44493)
One Town Square Suite 1835
Southfield, MI 48706
(248) 263-3517

CERTIFICATE OF SERVICE

Marc E. Curtis, Hereby certifies that on the 29th of April, 2014, he electronically submitted for e-filing Cross-Defendant John A. Kailunas, II Answer and Affirmative Defenses and Third Party Defendant Regal Investment Advisors, LLC Answer and Affirmative Defenses to Legacy Capital Partners, LLC Cross-Complaint and Mathew Erickson's Third Party Complaint with the Clerk of the Court using the Specialized Business Docket e-filing system, which will send notification of the such filing to all counsel of record who have filed an Appearance in this lawsuit.

Marc E. Curtis

Exhibit C: Default Entry

Approved, SCAO

Original - Court
1st copy - Applicant
Copies - All other parties

STATE OF MICHIGAN 17th JUDICIAL DISTRICT JUDICIAL CIRCUIT	DEFAULT REQUEST, AFFIDAVIT, AND ENTRY	CASE NO. 13-09947-CKB

Court address
180 Ottawa Avenue NW, Grand Rapids, MI 49503

Court telephone no.
(616) 632-5220

Plaintiff name(s), address(es), and telephone no(s).		Defendant name(s), address(es), and telephone no(s).
Cross-Plaintiffs: Legacy Partners, LLC and Matthew Erickson	v	Cross-Defendant: John A. Kailunas, II
Plaintiff attorney, bar no., address, and telephone no. Jill A. Bankey (P48202) Siegel, Greenfield, Hayes & Gross P.L.C. One Towne Square, Suite 1835 Southfield, MI 48076 (248) 263-3514		**Defendant attorney, bar no., address, and telephone no.** Dirk Marinus Roskam (P62988) 28 W. Central Blvd., Fl. 4 Orlando, FL 32801 (321) 402-9545

Party in default: Cross-Defendant John A. Kailunas, II

REQUEST AND AFFIDAVIT

1. I request the clerk to enter the default of the party named above for failure to plead or otherwise defend as provided by law.

2. The defaulted party is not an infant or incompetent person

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☐ The defaulted party is in the military but there has been notice of pendency of the action and adequate time and opportunity to appear and defend has been provided. Attached, as appropriate, is a waiver of rights and protections provided under the Servicemembers Civil Relief Act. Facts upon which this conclusion is based are: (specify)

4. This affidavit is made on my personal knowledge and, if sworn as a witness, I can testify competently to the facts in this affidavit.

Jill A. Bankey
Applicant/Attorney signature

P48202
Bar no.

Subscribed and sworn to before me on April 28, 2014 (Date), Oakland County, Michigan.

My commission expires: 5/25/17 (Date) Signature: Susan L Harris
Deputy court clerk/Notary public Susan L. Harris

Notary public, State of Michigan, County of Wayne, acting in Oakland

NOTE: Default can be entered by a district court clerk without the request of a party.

DEFAULT ENTRY

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05/13/14
Date

Deputy Court clerk

CERTIFICATE OF MAILING

I certify that on this date copies of this default were served on the appropriate parties or their attorneys by first-class mail addressed to their last-known addresses as defined by MCR 2.107(C)(3).

Date

Signature

MCL 32.517, MCL 600.2441, MCL 600.5759, MCR 2.603, 50 USC 521

Exhibit D: Motion to Set Aside Default

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

LEGACY CAPITAL PARTNERS, LLC A Michigan limited liability company; MATTHEW ERICKSON, an individual,	Hon. Christopher P. Yates
Cross-Plaintiffs	Case No. 13-09947-CKB

v.

JOHN A. KAILUNAS II, an individual,

Cross-Defendant

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Russell R. Wise (P44493)
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CROSSS DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO SET-ASIDE THE ENTRY OF DEFAULT AND DEFAULT JUDGMENT

I. Introduction

The Cross-Defendant are looking for the opportunity to present their claim that they are not responsible to Legacy under Legacy's and asking the Honorable Court to set aside the default for the reasons discussed below.

II. Statement of Facts

The Cross-Defendant, at the time of the entry of default, was being represented by Attorney Mr. Dirk M. Roskam of Fowler, O'Quinn, Feeney & Sneed, P.A. Although Attorney Mr. Marc E. Curtis was

working with Mr. Roskam at the time of the Cross-Plaintiff filing its Compliant, Mr. Curtis was on a hunting trip in South Dakota and was not aware that the Complaint had been filed and served.

On April 25, 2014, Mr. Curtis left Fowler, O'Quinn, Feeney & Sneed, P.A. and was notified on April 29, 2014, of the request for entry of Default against Cross-Defendant. Upon learning of the motion for entry of default, Cross-Defendant filed an answer with this Honorable Court on April 29, 2014 using the Specialized Business Docket e-filing system and service was completed through the e-filing system. On May 14, 2014, the Default was entered by the Court Clerk and the Cross-Defendant has filed the motion to set aside the default.

III. Discussion

A. Standard of Review

A trial court's decision on a motion to set aside a default or a default judgment will be reviewed for an abuse of discretion. *Park* v *American Casualty Ins Co*, 219 Mich App 62, 66; 555 NW2d 720 (1996). An abuse of discretion is the result of a decision that is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding* v *Spalding* 355 Mich 382, 384-385; 94 NW2d 810 (1959).

B. Manifest injustice would result if the default and default judgment are not set aside.

A motion to set aside a default judgment "shall be granted" if the defendant shows "good cause" for failing to answer the complaint and a "meritorious defense" to the allegations made in the complaint. MCR 2.603(D)(1). "Good cause" exists if the defendant has "a reasonable excuse for failure to comply with the requirements that created the default." Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 233; 600 NW2d 638 (1999).

The good cause requirement may also be satisfied by showing: (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to

comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the Default to stand. Freeman v Remley, 23 Mich App 441, 228; 178 NW2d 816 (1970).In our case, good cause is present.

The Cross-Defendant has a reasonable excuse for not filing an Answer to the Cross-Plaintiff's Complaint, which is the incident that led to the entry of default. The Cross-Defendant, at the time of the entry of default, was being represented by Attorney Mr. Dirk M. Roskam of Fowler, O'Quinn, Feeney & Sneed, P.A. Although Attorney Mr. Marc E. Curtis was working with Mr. Roskam at the time of the Cross-Plaintiff filing its Compliant, Mr. Curtis was on a hunting trip in South Dakota and was not aware that the Complaint had been filed.

Upon learning of the motion for entry of default, Cross-Defendant filed an answer with this Honorable Court on April 29, 2014 using the Specialized Business Docket e-filing system. Although this was done after the date it was required the late filing did not prejudice Cross-Plaintiff in any way. Mr. Kailunas's deposition had not been taken prior to that time and no interrogatories had been submitted to Cross-Defendant by Cross-Plaintiff.

There was no evidence that the defendants intentionally attempted to delay the adjudication of the Cross-Plaintiff's claims by failing to file their answer in a timely manner. The plaintiff was not prejudiced by the defendant's default, and the period in which the defendants were inactive in pursuing their defense was not unreasonably long. A refusal to set aside the default in this case would have epitomized manifest injustice.

In Shawl v Spence Bros, Inc, 280 Mich App 213, 238; 760 NW2d 674 (2008) the Court established factors relevant to the establishment of good cause which included: "(1) whether the party completely failed to respond or simply missed the deadline to file; (2) if the party simply missed the deadline to file, how long after the deadline the filing occurred; (3) the duration between entry of the default judgment and the filing of the motion to set aside; (4) whether there was defective process or notice; (5) the circumstances behind the failure to file or file timely; (6) whether the failure was knowing or intentional; (7) the size of the judgment and the amount of costs due; (8) whether the default judgment

results in an ongoing liability; and (9) if an insurer is involved, whether internal company policies were followed." Id at 238.

These factors are intended to provide guidance to the trial courts in determining whether a party has shown good cause, which is composed of a procedural irregularity or defect or a reasonable excuse for failure to comply with the requirements, for setting aside a default and are not intended to be exhaustive. Id.

Under these factors, the Defendant clearly established good cause. The Defendant did respond as soon as Mr. Curtis was notified of the action. And the response was made prior to the entry of any default or default judgment.

C. The default judgment and entry of default should also be set aside under MCR 2.612(C)(f) because doing so will not detrimentally affect the Plaintiff.

A court's decision to grant relief under MCR 2.612(C)(f) is also reviewed for an abuse of discretion. *Peterson* v *Auto-Owners Ins Co.*, 274 Mich App 407, 412; 733 NW2d 413 (2007).

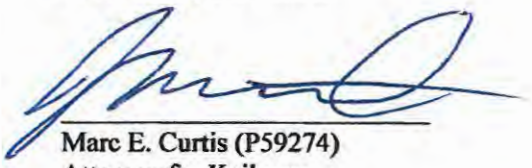
"In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice." *Heugel* v *Heugel* 237 Mich App 471, 478-479; 603 NW2d 121 (1999).

Defendants are not aware of any reason to set aside the default and default judgment under subsections a through e of MCR 2.612(C)(1)(f). Furthermore, the Defendants are not aware of any reason why the Plaintiff would be "detrimentally affected" should this court set aside the default and default judgment. Kailunas filed an answer with the Court on April 29, 2014. Although the filing of the answer was late it is "excusable neglect" that has not detrimentally affected the Legacy Capital.

IV. Conclusion

For all the foregoing reasons, the Defendants humbly request that this court set aside the default judgment.

Respectfully submitted,



Marc E. Curtis (P59274)
Attorney for Kailunas

Date: May 30, 2014