

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

ROLAND C. ANDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 2004-07-430
	)	
R. A. MIDWAY TOWING,	)	
	)	
Defendant.	)	

Submitted: December 9, 2006  
Decided: January 10, 2007

Roland C. Anderson  
113 Lloyd Street  
Wilmington, DE 19804  
Plaintiff, Pro se

James R. Kipp, Esquire  
Elzufon Auston Reardon  
Tarlov  
2500 Wrangle Hill Road  
Fox Run Business Park, #210  
Bear, DE 19701  
Attorneys for Defendant

**ORDER ON PLAINTIFF'S MOTION**  
**FOR SUMMARY JUDGMENT AND IN THE ALTERNATIVE**  
**ENTRY OF DEFAULT JUDGMENT BY CLERK OF THE COURT**

Plaintiff moves pursuant to Court of Common Pleas *Civil Rule 56* for an order of the Court granting summary judgment. Plaintiff argues that his car was towed by Defendant to a repair shop other than that which was instructed by himself or the agent requesting the car be towed. As a result thereof, Plaintiff argues he sustained damage in the amount of the full value of the vehicle towed and cost of these proceedings.

Plaintiff further seeks the Court to direct the Clerk under *Rule 55(a)(1)* for an entry of judgment.

When considering a motion for summary judgment, the Court must examine the record to determine whether there are any genuine issues of material fact. Therefore, summary judgment will only be granted after the Court reviews the record in the light most favorable to the non-moving party, and concludes that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. The defendant has not filed a response to the motion for summary judgment; therefore, the Court must conclude that the Defendant does not dispute the allegations set forth by Plaintiff in the motion. However, notwithstanding, the Defendant's failure to respond to the motion, the Court is still obligated to examine the record to determine if there are factual disputes before it can enter an order of default judgment under *Rule 56*.

In the motion, Plaintiff restates the allegation set forth in the complaint arguing that his car was towed to a repair shop other than that which was directed by Defendant. In its responsive pleading, the Defendant disputes that Plaintiff's car was towed at any place other than that which it was directed. Defendant alleges that the tow operator took Plaintiff's vehicle from his residence at 113 Lloyd Street, Wilmington, Delaware on May 5, 2002 at the express direction, and delivered it to the auto shop as directed by Plaintiff. Therefore, there is a dispute in the record involving the instruction given by Plaintiff and the action taken by the Defendant. Because I conclude that there are material facts in dispute, a motion for summary judgment is not appropriate at this stage in the proceeding and is hereby Denied.

Plaintiff moves pursuant to Court of Common Pleas *Civil Rule 55(a)(1)* for entry of judgment of by the Clerk. An entry of judgment under *Rule 55* is only appropriate when the party against whom judgment is sought has failed to appear, plead or otherwise defend as provided by the rules. In these proceedings, the Defendant has filed an answer to the allegation disputing liability. While Plaintiff is accurate in its assertion that the Defendant had failed to answer or respond to its motion for summary judgment, the rules does not permit the Court to enter judgment on the basis that the Defendant failed to respond. By failing to respond, the Court merely looks at the record as argued by the Plaintiff since there was no response by Defendant. However, the failure to respond does not provide a basis for entry of judgment under *Rule 55*; therefore, Plaintiff's motion is hereby Denied. This matter remains scheduled for trial January 19, 2007, 9:00 a.m.

IT IS SO ORDERED this 10<sup>th</sup> day of January, 2007

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Alex J. Smalls  
Chief Judge