IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

Abena W. Nti,	:	
	:	C.A. No. 06-08-0081AP
Defendant below/ Appellant,	:	
	:	
v.	:	
	:	
Herman L. Hall,	:	
	:	
Plaintiff below/ Appellee.	:	

Submitted: August 24, 2007

Decided: August 24, 2007

Decision on appeal from the Justice of the Peace Court.

The Defendant's Motion for Reargument is granted and

Judgment is entered against the Plaintiff.

Sean M. Lynn, Esquire, Hudson, Jones, Jaywork & Fisher, 225 South State Street, Dover, Delaware 19901, Attorney for Appellant.

Herman L. Hall, 1256 South Little Creek Road, Dover, Delaware 19901, Pro See Appellee.

Trader, J.

In this civil appeal from the Justice of the Peace Court, I grant the defendant's Motion for Reargument because the plaintiff appellee failed to serve a copy of the complaint on the defendant as required by Rule 55(bb2) and Rule 72.3(a) of this Court. Accordingly, I enter a default judgment against the plaintiff for the costs of these proceedings.

The Posture of the Case

On August 3, 2006, judgment was entered on behalf of Herman L. Hall and against Abena W. Nti for $1,549.10 plus court costs and post-judgment interest. The defendant filed a notice of appeal and praecipe with this Court on August 10, 2006 and a copy of the praecipe and notice of appeal were served upon the plaintiff on August 18, 2006. On September 7, 2006, the plaintiff filed a complaint with this Court, but he failed to serve a copy of the complaint upon the attorney for the defendant. On June 27, 2007, a notice of inactivity was sent to the parties by the Civil Clerk of the Court pursuant to Rule 41(e). In response to this notice, the defendant moved for a default judgment on the grounds that the plaintiff appellee failed to plead as required by the rules of the Court. Since the plaintiff had filed a complaint, the motion for a default judgment was denied. The defendant has now filed a motion for reargument on the grounds that the complaint was not served upon counsel for the defendant as required by Rule 5(b), Rule 5(f), Rule 55(bb2), and Rule 72.3(a).

Mandatory Requirement of the Rules

The Rules of procedure are to be administered so as to secure the just determination of every proceeding. *Court of Common Pleas Civil Rule* 1. The language of Rule 5(b) and Rule 5(f) of this Court is mandatory. Rule 5(f) states that "no pleading or other paper . . . shall be filed" unless contemporaneous proof of service upon all parties required to be

served is provided. *Id.* 5(f). Rule 5(b) provides for the method by which said service shall be made. This proof of service is provided by an affidavit showing that service was made and how it was made. *Id.* Under Rule 5(b), whenever a party is represented by an attorney, service shall be made on the attorney.

Rule 72.3 regarding Appeals *de novo* provides in its pertinent part as follows, "[w]hen the appellee is the party having the duty of filing the complaint or other first pleading on appeal, the appellee *shall serve a copy* of such pleading within 20 days after service of the process on appeal." *Court of Common Pleas Civil Rule* 72.3(a)(emphasis added). Further, Rule 55(bb2) states "[w]hen an appellee having the duty of serving the complaint or other first pleading fails to do so as required by Rule 72.3(a), *judgment shall be entered* against appellee for failure to plead. When an appellee having the duty of serving a responsive pleading fails to do so as required by Rule 12(a), *judgment may be entered as* provided in paragraph (b) [of Rule 55]." *Id.* Rule 55(bb2) (emphasis added).

"While the words 'shall' and 'may' do not always by themselves determine the mandatory or permissive character of a statute, it is generally presumed that the word 'shall' indicates a mandatory requirement." *Del. Citizens for Clean Air, Inc. v. Water and Air Resources Comm'n*, 303 A.2d 666, 667 (Del. Super. Ct. 1973).

The presumption that the word "shall" indicates a mandatory requirement is further supported by the use of the word "may" within the language of the same Rule. "The use of both 'may' and 'shall' in the same provision may afford a very forcible indication of the intention. Thus the use of the words that are plainly compulsory in one aspect, and the use of others, which clearly are permissive in another, necessarily leads to an inference that the primary meaning is to be retained." *State ex. rel. Foulger v. Layton*, 194 A. 886, 889 (Del. Super. Ct. 1937); but see *Williams Jones & Sons, Inc. v. Engelskirch,* 2001 WL 34075505

(Del. Com. Pl. Ct. 2001) (where the plaintiff served a copy of the Complaint upon the defendant corporation instead of its attorney, it was held that the word "shall" did not indicate a mandatory requirement).

The Standard Applicable to a *Pro Se* Litigant

The Supreme Court of Delaware has held that "[a]n appellant's *pro se* status does not excuse a failure to comply strictly with the jurisdictional requirements of the statute and court rule." *Laboy v. State*, 846 A.2d 238, 238 (Del. 2003). Similarly, the District Court for Delaware has stated "a plaintiff's *pro se* status does not, alone, justify the application of equitable principles to excuse the failure to meet procedural requirements. Indeed, '[a]lthough . . . conformity with procedural rules should be viewed liberally when a litigant is acting *pro se*, the rules are not suspended simply because the litigant is unrepresented by counsel. The *pro se* complainant must exercise reasonableness and good faith in prosecution of his claim.'" *Arots v. Salesianum Sch., Inc.*, 2003 WL 21398017 (D. Del. 2003)(citing *Carter v. Three Unknown Police Officers*, 112 F.R.D. 48, 52 (D. Del. 1986)).

In the present case, although the appellee did file a complaint, he failed to serve a copy of the complaint upon the appellant or appellant's counsel within the required time. The appellee was initially made aware of his duty to serve his complaint upon the appellant by the language of the summons on appeal served upon him on August 18, 2006. Additionally, the appellee was again made aware of his duty both by the Civil Rules of this Court and by the General Instructions for an Appeal from the Justice of the Peace Court that was made available to the *pro se* appellee by the civil clerk.

The Appellant's Request for Attorney's Fees

Finally, the Appellant has requested an award of reasonable attorney's fees. Since

the United States Supreme Court disallowed an award of attorney's fees to the winning party in a 1796 admiralty matter, the courts of this nation have followed what is generally referred to as the American Rule. *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306, 1 L.Ed. 613 (1796). The American Rule is that each party must bear his or her attorney's fees and expenses of litigation absent some specific statutory or contractual provisions or other special circumstances that warrant a shifting of attorney's fees, which, in equity may be awarded at the discretion of the Court. *Beck v. Atlantic Coast PLC,* 868 A.2d 840, 850 (Del. Ch. 2005); see also *Goodrich v. E.F. Hutton Group, Inc.,* 681 A.2d 1039, 1043-44 (Del. 1996); *Johnston v. Arbitrium (Cayman Islands) Handels,* 720 A.2d 542, 545 (Del. 1998); *Kaung v. Cole Nat'l. Corp.,* 884 A.2d 500, 506 (Del. 2005). Since there is neither a statutory provision nor a contract authorizing the payment of attorney's fees in the present case, the Court of Common Pleas, a court of law, cannot award such fees.

Additionally, although the Plaintiff's conduct was lackadaisical, I do not find his conduct sufficiently egregious to impose a sanction for the payment of attorney's fees. Stated otherwise, I do not find he conducted the litigation in bad faith. In accordance with the above conclusions of law, the motion for reargument is granted and judgment is entered on behalf of Abena W. Nti and against Herman L. Hall for the costs of these proceedings.

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Merrill C. Trader
Judge