

SUPERIOR COURT
of the
State of Delaware

William L. Witham, Jr.
Judge

Kent County Courthouse
38 The Green
Dover, Delaware 19901
Telephone (302) 739-5332

January 11, 2005

William W. Pepper, Sr., Esquire
Schmittinger and Rodriguez
414 South State Street
Dover, Delaware 19901

Mr. Gary A. Myers
217 New Castle Street
Rehoboth Beach, Delaware 19971

Re: ***City of Dover v. Gary A. Myers***
C.A. No. 04C-10-049

Messrs. Pepper and Myers:

Before this Court is Mr. Myers' motion for entry of judgment consistent with the provisions of 10 *Del. C.* § 9574(b) and award for costs. On December 3, 2004, oral arguments were presented before this Court and Appellee's motion was *granted in part* and *denied in part*. This is the Court's supplemental memorandum.

This case commenced in the Justice of the Peace Court No. 7 where the City of Dover ("Plaintiff-Appellant") initiated a civil action against Gary Myers ("Defendant-Appellee") under the provisions of 21 *Del. C.* § 4101(d) (liability for failure to comply with traffic light signals). The magistrate dismissed the action on September 23, 2004 concluding that the City had failed to enact a municipal program

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by ordinance as required by the governing state statute. On October 7, 2004, the City filed an appeal in the Court of Common Pleas challenging the magistrate's order of dismissal. On October 15, 2004, Appellee requested a jury trial and paid the requisite \$175.00 filing fee to have the case transferred to Superior Court.¹ The case was subsequently transferred to this Court on October 26, 2004. Pursuant to Superior Court Civil Rule 41(a)(1), Appellant filed a notice of voluntary dismissal on October 29, 2004 to have its appeal dismissed without prejudice. On November 1, 2004, Appellee contacted the Prothonotary contending that a Rule 41(a)(1) dismissal was inappropriate. The Prothonotary informed Appellee that the case had been closed earlier as requested by Appellant and explained that the appropriate procedure would be for Appellee to present his argument in the form of a motion before this Court.

Appellee subsequently filed this motion contesting the authority of Appellant to unilaterally dismiss this appeal pursuant to Rule 41(a)(1). Appellee claims that 10 *Del. C.* § 9574(b) governs dismissals of appeals from the Justice of the Peace Court and contends that the appropriate procedure would be to dismiss the appeal, remit the record to the magistrate's court, and award costs to the defendant. Appellant has filed a response to Appellee's motion challenging the jurisdiction of

¹ 10 *Del. C.* §1328 (d) provides "Upon demand for trial by jury as provided in this section, the Clerk of the Court shall forthwith transmit all records in the matter and the amount necessary for commencement of an action in Superior Court to the Prothonotary of the county in which the action has been commenced. Following such removal, proceedings shall continue as though the action has been commenced in Superior Court.

this Court and Appellee' s entitlement to costs.

The pivotal issue before this Court is whether Appellant can unilaterally dismiss its appeal pursuant to Rule 41(a)(1). In pertinent part, Rule 41(a) provides:

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by stipulation. Subject to payment of costs and the provisions of Rule 23(e), an action may be dismissed by the plaintiff without order of the court (I) except in replevin, by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment whichever first occurs or (II) by filing a stipulation of dismissal signed by all the parties who have appeared in the action...²

Although this rule generally allows the plaintiff to dismiss an action without an order of the court by simply filing a notice of dismissal before the adverse party serves an answer or files a motion for summary judgment, this Court holds that a party may not unilaterally dismiss its action when such action arises before this Court in the form of an appeal from a Justice of the Peace Court. Rule 41(a) was intended to allow a party to voluntarily dismiss its action in the early stages prior to the defendant being prejudiced by such proceedings. Thus, voluntary dismissals are rarely challenged because the adverse party would prefer to have the action dismissed and avoid the burdens of litigation. However, when the action arises before this Court in the form of an appeal from the Justice of the Peace Court, the case has already been litigated and decided in favor of Appellee. In the case *sub judice*, Appellee has already successfully obtained a dismissal of this action in the

² Super. Ct. Civ. R. 41.

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Justice of the Peace Court and has already paid the requisite filing fee to have this appeal transferred to the Superior Court. This Court believes such actions are the functional equivalent to serving an answer or filing a motion for summary judgment and therefore preclude Appellant from unilaterally dismissing its appeal. To have its appeal voluntarily dismissed pursuant to Rule 41(a), Appellant would have to either obtain a court order or file a stipulation of dismissal signed by all of the parties who have appeared in this action. Because Appellant cannot unilaterally dismiss its case merely by filing a notice of dismissal, Appellant's voluntary dismissal pursuant to Superior Court Civil Rule 41(a)(1) is void.³

Although this Court concurs with Appellee that Appellant lacks the authority to unilaterally dismiss this appeal, this Court finds that it is premature to grant Appellee's motion for entry of judgment in accordance with 10 *Del. C.* § 9574. This statute provides:

§ 9574. Abatement and Dismissal.

(a) ...

(b) If after entering an appeal, the appellant neglects to prosecute it, or fails to comply with any rule, or makes other default, so that in a like case, in any other suit in Court, a nonsuit, non pros., or judgment by default would be entered, the Court shall dismiss the appeal, and remit the record to the justice, and give judgment for the respondent for costs; whereupon the justice shall

³ Appellant also contests the jurisdiction of this Court to adjudicate this motion. This Court originally obtained subject matter jurisdiction over this appeal by virtue of 10 *Del. C.* § 9572 and 10 *Del. C.* § 1328. Because Appellant's attempt to unilaterally dismiss its appeal is void, such action does not divest this Court of subject matter jurisdiction. Accordingly, this Court retains subject matter jurisdiction of this appeal.

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strike off the appeal.⁴

Appellant has simply attempted to have its appeal voluntarily dismissed and such action does not trigger the procedure set forth in 10 *Del. C.* § 9574. This Court believes that awarding costs forthwith would thus be untimely and holds that the appropriate remedy presently is to vacate the dismissal and allow the case to proceed forward. 10 *Del. C.* § 9574 will however govern in the event that Appellant fails to diligently pursue its appeal.

Accordingly, based upon the aforementioned reasons, Appellee' s motion is hereby *granted in part* and *denied in part*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

⁴ 10 *Del. C.* § 9574.