

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CASSANDRA SHARP, :
 : C.A. No. 05C-02-037 WLW
Plaintiff, :
 :
v. :
 :
STATE FARM MUTUAL :
AUTOMOBILE INSURANCE, :
 :
Defendant. :

Submitted: January 20, 2006
Decided: January 24, 2006

ORDER

Upon Defendant's Motion to Strike
Plaintiff's Appeal. Denied.

William F. Jaworski, Jr., Esquire of the Law Office of William F. Jaworski, L.L.C.,
Dover, Delaware; attorneys for the Plaintiff.

Kenneth M. Doss, Esquire of Casarino, Christman & Shalk, P.A., Wilmington,
Delaware; attorneys for the Defendant.

WITHAM, R.J.

Sharp v. State Farm Mutual Automobile Ins.

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Defendant, State Farm, filed a motion to strike Plaintiff's, Cassandra Sharp, appeal pursuant to Superior Court Civil Rule 16.1(k)(9) and 37(d) and requests that this Court enter the Arbitrator's Order in favor of Defendant as a defense judgment pursuant to Rule 16.1(k)(11)(E)(i). The facts as alleged by Defendant are as follows: on September 20, 2005, an arbitration was held in Plaintiff's counsel's office. Plaintiff's counsel, Defendant's counsel, and the arbitrator all appeared; however, Plaintiff failed to appear. Such failure was not excused. Consequently, the arbitrator entered a judgment in favor of Defendant with costs assessed against Plaintiff on September 21, 2005. Plaintiff had 20 days from that date to demand a trial *de novo* from this Court. Plaintiff did file a demand, which is dated September 27, 2005. However, Defendant alleges that it was never served a copy of the demand and only became aware of the appeal when it received this Court's Scheduling Order.¹ As a result, Defendant is asking this Court to strike Plaintiff's appeal.

¹The demand for trial *de novo* was served on Colin Shalk on September 26, 2005. However, on June 21, 2005 Mr. Shalk withdrew as counsel and Kenneth Doss entered his appearance on behalf of Defendant. Notably, both Mr. Shalk and Mr. Doss work for the firm Casarino, Christman & Shalk, which is indicated in the Substitution of Appearance of Counsel. Further, Superior Court Civil Rule 5(b) reads, "*Service of pleadings and papers: How made.* Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the Prothonotary. Delivery of a copy within this Rule means: Handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing."

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For the reasons set forth below, Defendant's Motion to Strike Plaintiff's Appeal is *denied*.

Discussion

Rule 16.1(k)(9) states:

Each party and each attorney, unless excused by the ADR Practitioner, shall appear and participate in the arbitration hearing. A party who without being excused, fails to appear at an arbitration hearing shall not be entitled to demand a trial *de novo*, except upon payment of the total ADR Practitioner's fee and all Court costs incurred to date. Failure to appear and participate by any person whose attendance is required shall subject the offender to sanctions under Civil Rule 37(d) of the Superior Court Civil Rules.

Rule 37(d) allows this Court to "make such orders in regard to the failure as are just" It also permits this Court to require the party who failed to act to "pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

Rule 16.1(k)(11)(E)(i) says that if a demand for a trial *de novo* is not "timely filed and a judge upon motion has entered an order of judgment with the Prothonotary shall: (i) record the order of judgment in the proper docket and judgment index."

After hearing oral argument from both parties on the motion and reviewing the applicable statutes, I conclude that I have discretion in permitting the demand for a trial *de novo*. I find that Defendant was properly served given the admitted fact that both defense attorneys were at all times within the same office and of the same firm.

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In addition, the firm's appearance is noted on the pleading. Therefore, if Plaintiff pays the ADR Practitioner's fees and all Court costs incurred to date, the demand for a trial *de novo* is allowed to stand.

Based on the foregoing, Defendant's Motion to Strike Plaintiff's Appeal is *denied*. IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution