

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

ESTRELLA ACOSTA,	:	
	:	TRIAL DIVISION-CIVIL
Appellant	:	
	:	
V.	:	DECEMBER TERM, 2002
	:	NO. 3924
	:	
	:	
DAVID NEAL,	:	Superior Court Docket No.
	:	908 EDA 2008
Appellee	:	

OPINION

PROCEDURAL HISTORY

Plaintiff Estrella Acosta’s attorney, Allen L. Feingold, appeals from the January 29, 2008 Order granting the Defendant David Neal’s Motion to Deposit Funds whereby \$8,330 was awarded to Acosta and \$4,170 was awarded to Feingold.

FACTUAL BACKGROUND

On December 29, 2000, Plaintiff Estrella Acosta (hereinafter “Acosta”) was driving on Route I-95 when an accident caused by Defendant David Neal’s motor vehicle resulted in numerous injuries to Acosta’s head and body. (Complaint ¶¶ 2-3, 7).

On December 27, 2002, Acosta’s counsel, Allen Feingold (“Feingold”), commenced an action against the Defendant alleging that the Defendant was negligent

while operating his motor vehicle. (See Docket, pg. 2, Complaint ¶ 2). The Defendant was insured by Geico Insurance Company (“Geico”). (Complaint ¶ 2). When the matter proceeded to arbitration on December 11, 2003, an arbitration panel awarded \$12,500 in favor of Acosta. (Motion to Deposit Funds, Pg. 1). On December 17, 2003, Plaintiff appealed the initial arbitration award. (See Docket, pg. 8).

Defendant’s counsel, Pamela Hinton (“Hinton”), stated that both parties agreed to transfer the case to a binding alternative dispute resolution (“ADR”). (Motion to Deposit, scheduled for July 2004 was to be binding upon both parties. (Trial Work Sheet, July 16, Pg. 2). Significantly, the trial worksheet supports Hinton’s statement that the ADR 2004, Attachment 1). Accordingly, in July 2004, the ADR judge awarded \$12,500 in favor of Acosta and Geico issued a check for the amount made payable to Acosta, but mailed the check to her attorney, Allen Feingold. (Motion to Deposit Funds, pg. 2, Exhibit B). However, Feingold failed to disburse any money to Acosta. (Motion to Deposit, pg. 2).

Geico attempted to contact Feingold on several occasions to determine the status of cashing the check and offered to issue a separate check to Acosta to satisfy the matter. (Motion to Deposit, pg. 2, Exhibit C). In response, Geico stated that on November 1, 2005, Feingold threatened to sue Geico if it issued separate checks from the ADR award. (Motion to Deposit, pg. 2, Exhibit E). However, on November 5, 2005, Acosta sent a letter and advised Geico to issue her a check in the amount of \$8,330 and a separate check in the amount of \$4,170 to Feingold in an effort to settle the matter and obtain her portion of the ADR award. (Motion to Deposit, pg. 2, Exhibit F). Thereafter, Acosta sent a letter on November 6, 2005 requesting authorization from Feingold allowing Geico to issue two separate checks to settle the matter. (Motion to Deposit, pg. 2, Exhibit D). Another letter was sent to Feingold on August 2, 2007, approximately three (3) years after the ADR award, requesting the same authorization. (Motion to Deposit, pg. 2, Exhibit D).

Hinton stated that Acosta contacted her several times to issue separate checks in order to satisfy the ADR award. (Motion to Deposit Funds, pg. 2). Thereafter, Hinton filed a Motion to Deposit Funds on December 21, 2007 in an attempt to deposit the required funds to satisfy the ADR award with the court. (See Docket, pg. 11). In the motion, Hinton stated that Feingold received Geico’s check, but failed to disburse the

money to Acosta. (Motion to Deposit Funds, pg. 2). On January 29, 2008, the Court granted the Defendant's Motion to Deposit Funds in the amount of \$12,500 to satisfy the award and marked the motion as *uncontested* since no response was received from Feingold by the January 10, 2008 deadline. (See January 29, 2008 Order)(emphasis added). It was further ordered that the Court shall issue payment from the deposited funds to Plaintiff Acosta in the amount of \$8,330 and to her attorney, Feingold, in the amount of \$4,170. (See Docket, pgs. 11-12).

On February 7, 2008, Plaintiff filed an *untimely* response to the Defendant's Motion to Deposit Funds. (See Docket, pg. 12)(emphasis added). The response alleged that the ADR award was not binding since it was not confirmed by the court, despite the Trial Work Sheet clearly marking the case as "Discontinue/Transfer Binding Arb." (Motion for Reconsideration, pgs. 1-2; Trial Work Sheet, July 16 2004). In addition, Feingold denied receiving any check from Geico and stated that Geico contacted him once asking when the check would be disbursed to Acosta. (Feingold's Answer, pg. 1, 3). Furthermore, he verified Geico's statement that he would sue if Geico issued a check to Acosta for any money that was allegedly owed to him for fees and costs. (Feingold's Answer, pg. 2). Feingold also stated he had a fee agreement with Acosta, where she would be obligated to pay the court costs and fees; however, he failed to produce any supporting evidence to this allegation. (Motion for Reconsideration, pg. 2). Significantly, this allegation is disputed in Hinton's Motion to Deposit Funds, as Hinton stated that Acosta did not enter into any written fee agreement with Feingold. (Motion to Deposit Funds, pg. 3).

On February 12, 2008, Geico paid \$12,500 into the Court and on February 27, 2008, the Court ordered payout of escrow and disbursed \$8,330 to Acosta and \$4,170 to Feingold. (See Docket, pg. 12). On March 3, 2008 Feingold, now acting as the Plaintiff, appealed the matter to the Superior Court on his own behalf and issued his Statement of Matters on April 4, 2008 pursuant to Pa.R.A.P. 1925(b). (See Docket, pg. 13). The issue raised by Feingold on appeal is whether the trial court had authority to order payment into escrow and to issue two checks separately distributing the funds to the plaintiff and her counsel.

LEGAL ANALYSIS

When reviewing fees granted or distributed by the court, the court can only reverse by a showing of plain error. *Gilmore v. Dondero*, 399 Pa. Super. 599, 605 (1990). “Plain error is found where the award is based either on factual findings for which there is no evidentiary support or on legal factors other than those that are relevant to such an award.” *Id.*

Feingold, having failed to file a response prior to this Court’s ruling on the Motion to Deposit Funds, provides no factual or legal support that the distribution was improper. Local Rule 208.3(b) explains the motion filing process which Feingold failed to adhere to in filing his overdue response. The section states:

Other than as provided in Phila.Civ.R. *208.3(a) and except for Summary Judgment Motions (which have a thirty (30) day response period, *all Motions have a twenty (20) day response period*. Upon filing, the Motion Clerk shall enter on the Cover Sheet a unique Control Number which must be used on all Responses, and shall enter the ‘Response Date’ on or before which all Responses must be filed by any party. (emphasis added).

PA Philadelphia Cty. Civ. LR 208.3(b)(2)(B)(2007). It is this Court’s position that Feingold filed an untimely response to the Defendant’s Motion to Deposit Funds and waived his opportunity to contest Defendant’s Motion. In addition, his dilatory conduct resulted in the granting of the Motion.

In the present case, when the underlying negligence claim was transferred to a binding ADR, a judge awarded \$12,500 in favor of Acosta. Geico issued a check for that amount to Acosta, but mailed it to Feingold, who never disbursed any money to Acosta. Acosta failed on several occasions to obtain her portion of the ADR award from Feingold, and as a result, Acosta contacted Hinton requesting a separate check mailed to her for her portion of the ADR award. Hinton subsequently filed a Motion to Deposit Funds in a final attempt to satisfy the binding ADR award and disburse the money to Acosta. Feingold’s conduct stalled the distribution of funds for approximately three (3) years, prior to submission of the Motion to Deposit Funds.

The Motion to Deposit Funds was filed on December 21, 2007 and the response deadline was January 10, 2008. The Court granted the Defendant's Motion to Deposit Funds with the Court on January 29, 2008 marking the motion as uncontested and two separate checks were issued to Acosta for \$8,330 and to Feingold for \$4,170. The fact that the motion was marked as uncontested shows that Feingold filed an untimely response as it was not filed until February 7, 2008, a significant amount of time after the required twenty (20) day response period and after this Court ruled on the motion.

As a result of Feingold's untimely response, he has waived any opportunity to dispute any facts in the Defendant's Motion to Deposit Funds. Our Superior Court has previously held that a "waiver frequently occurs when a litigant fails to follow established and approved methods of raising allegations of error in the lower court or in appellate courts." *Strickler v. United Elevator Co.*, 257 Pa. Super. 542, 548 (1978). It is within the trial court's discretion to allow the non-moving party to respond to a motion after the required response date has elapsed. *Commonwealth v. Jash Int'l, Inc.*, 847 A.2d 125, 130 (Pa. Commw. Ct. 2004)(citing *Thomas v. Elash*, 2001 PA Super 214, 781 A.2d 170, 177 (2001)). Upon allowing a non-moving party to file an untimely response, our Superior Court has consistently held that a counsel's mistake or inadvertence will often justify the consideration of an untimely response, however, a reasonable excuse for its lateness must be offered. *Vorhauer v. Miller*, 311 Pa. Super. 395, 404 (Pa. Super. Ct. 1983).

Feingold's disregard for the court rules is illustrated by his failure to disburse any of the ADR award to Acosta and by his failure to file a timely response to the Motion to Deposit Funds. Since Feingold's response to the Motion to Deposit Funds was filed twenty-eight (28) days after the response date, the motion was marked as uncontested. In Feingold's response to the Motion to Deposit Funds, he alleged no mistake or inadvertence as to why the response was untimely. He merely admitted and denied the averments made in the Defendant's Motion to Deposit Funds. Since no excuse was offered by Feingold, this Court exercised fair discretion under the law in deciding not to consider the response. Consequently, Feingold's untimely response constitutes a waiver of any objections Feingold had to the facts asserted in the Motion to Deposit Funds. Since the objections were waived, the Court cannot accept any of Feingold's allegations

contained in his response. Therefore, the Court properly distributed one-third of the ADR to Feingold and two-thirds to Acosta.

Feingold's failure to cooperate with the Defendant and Geico in distributing the required portion of the ADR award to Acosta, coupled with the untimely response to the Motion to Deposit Funds without a reasonable excuse, is clear evidence of Feingold's lack of due diligence in adhering to the rules of the court.

In viewing all of the facts, the Plaintiff's counsel filed an untimely answer to the Defendant's Motion to Deposit Funds rendering the Motion as uncontested. No reasonable excuse has been supplied by the Plaintiff's counsel to justify the opening of the uncontested Motion and therefore, any objections to the facts in the Motion to Deposit Funds are waived.

CONCLUSION

For all the aforementioned reasons this Court properly granted Defendant's Motion to Deposit Funds with the Court and respectfully requests that the January 29, 2008 Order be affirmed.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.

cc:

Allen L. Feingold
Pamela B. Hinton, Esq.