

IN THE DISTRICT COURT OF THE CHEROKEE NATION

CHEROKEE NATION EDUCATION
CORPORATION, d/b/a CHEROKEE
NATION FOUNDATION,

Plaintiff,

v.

KIMBERLIE GILLILAND,

Defendant.

Case No. CV-16-397

FILED
2017 FEB 27 AM 8:46
CHEROKEE NATION
DISTRICT COURT
KRISTI HONCOOYEA
COURT CLERK

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION
TO DEEM PLAINTIFF'S REQUESTS FOR ADMISSIONS ADMITTED**

Defendant Kimberlie Gilliland ("Gilliland") submits her response to Plaintiff Cherokee Nation Education Corporation's ("CNEC") motion to deem CNEC's premature requests for admissions admitted.

INTRODUCTION

CNEC improperly served requests for admissions before the parties held the conference required by Fed. R. Civ. P. 26(f). CNEC's requests for admissions were therefore premature under Fed. R. Civ. P. 26(d)(1) and Gilliland was not required to respond to them. Even if CNEC's requests for admissions were not premature, CNEC's motion addresses issues directly involved in Gilliland's appeal to the Supreme Court. This Court therefore lacks jurisdiction to enter an order deeming CNEC's requests for admissions admitted. CNEC's motion should therefore be denied.

FACTS

CNEC filed this action against Gilliland on July 27, 2016. Even though the parties had not conducted the planning conference required by Fed. R. Civ. P. 26(f) and CNEC had not obtained an order from this Court or agreement from Gilliland to begin discovery prior to the

required Rule 26(f) conference, CNEC served requests for admissions on Gilliland on that same date.

On August 17, 2016, Gilliland filed a motion to dismiss CNEC's embezzlement and conversion claims on the ground that such claims are barred by the applicable statutes of limitations. On that same date, Gilliland also filed a motion to stay discovery in this action pending the disposition of a criminal case the Cherokee Nation had filed against Gilliland on July 28, 2016, entitled *Cherokee Nation v. Gilliland*, CRM-2016-54 (the "Criminal Case").

On December 2, 2016, the district court heard oral argument on Gilliland's motions. On December 9, 2016, the Court rendered a written decision denying Gilliland's motions.

On December 30, 2016, Gilliland, in accordance with Cherokee Nation Supreme Court Rule 50(A) which allows any party significantly and adversely affected by a decision of the district court in a civil case to appeal such a decision, timely filed her petition in error in the Supreme Court. That appeal remains pending.

On February 14, 2017, CNEC filed its motion to compel Gilliland to respond to CNEC's premature requests for admissions. CNEC filed this motion even though its counsel had not conferred with Gilliland's counsel as required by Fed. R. Civ. P. 37(a)(1) to attempt to resolve the matter without Court action.

ARGUMENTS AND AUTHORITIES

I. CNEC'S REQUESTS FOR ADMISSIONS WERE SERVED IN VIOLATION OF FED. R. CIV. P. 26(d)(1) AND THEREFORE NEED NOT BE ANSWERED

The Cherokee Nation Code provides that, "The Federal Rules of Civil Procedure shall be used in the Cherokee Nation courts and all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation Rule of Civil Procedure." 12 CNCA § 5(A). The sole provision of either the Code or the District Court rules regarding pre-trial discovery in a

civil action is Rule 109 which simply provides that each answer or objection to an interrogatory, request for admission or document request must be immediately preceded by the interrogatory or request to which the response is made. There is thus nothing in either the Code or this Court's rules which supersedes the Federal Rules of Civil Procedure regarding the procedures for pre-trial discovery. The Federal Rules of Civil Procedure regarding discovery therefore apply to this action.¹

The Federal Rules plainly tie the opening of discovery to the Rule 26(f) conference. *Passmore v. Baylor Health Care Sys.*, 823 F.3d 292, 297-98 (5th Cir. 2016). Pursuant to Rule 26(d)(1), "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Fed. R. Civ. P. 26(d)(1); *Dixon v. Bd. of Cnty. Comm'rs of Oklahoma Cnty.*, 2016 WL 5017332 at *2 (W.D. Okla., Sept. 19, 2016); *Payn v. Kelley*, 2015 WL 7779701 at *2 n.5 (W.D. Okla., Dec. 2, 2015); accord, *Thompson v. Fred's Stores of Tennessee, Inc.*, 2015 WL 5655948 at *2 (S.D. Miss., Sept. 24, 2015). Rule 26(d)(1) applies to requests for admissions as well as to interrogatories and document requests. See, e.g., *Thompson*, 2015 WL 5655948 at *2; *Long v. Alcoa, Inc.*, 2010 WL 3338559 at *2-3 (E.D. Tenn., Aug. 24, 2010); *DIRECTV, Inc. v. DeVries*, 302 F. Supp. 2d 837, 838 (W.D. Mich. 2004).

In the present case, the parties have not conducted the Rule 26(f) conference required by Rule 26(d)(1) before discovery can begin. There is neither an order from this Court nor a stipulation by the parties to allow discovery to begin without the required Rule 26(f) conference. Gilliland was therefore not required to respond to CNEC's requests for admissions which were

¹ CNEC acknowledges in its motion that the Nation has not adopted a discovery code and that it therefore seeks to rely on the requirements of Rule 36 of the Federal Rules of Civil Procedure as the basis for its motion.

served in violation of Rule 26(d)(1). *Thompson*, 2015 WL 5655948 at *2. Gilliland's failure to respond to CNEC's requests for admissions within 30 days of CNEC's improper service of those requests can therefore not be deemed an admission. *Thompson*, 2015 WL 5655948 at *2;² *Long*, 2010 WL 3338559 at *2-3;³ *DIRECTV*, 302 F. Supp. 2d at 838.⁴

II. THIS COURT LACKS JURISDICTION TO ENTER AN ORDER DEEMING CNEC'S REQUESTS FOR ADMISSIONS ADMITTED

As a general matter, the timely filing of an appeal is an event of jurisdictional significance. *Trant v. State*, 2010 WL 5139105 at *1 (W.D. Okla., Dec. 10, 2010). The timely filing of an appeal confers jurisdiction on the appellate court and divests the trial court of jurisdiction and any control of those aspects of the case involved in the appeal. *E.g., Garcia v. Burlington N. R.R.*, 818 F.2d 713, 721 (10th Cir. 1987); *Int'l Paper Co. v. Whitson*, 595 F.2d 559, 561-62 (10th Cir. 1979). Any subsequent action taken by the trial court regarding a matter involved in the appeal is therefore null and void. *Garcia*, 818 F.2d at 721.

² In *Thompson*, the plaintiff moved for summary judgment or for judgment on the pleadings based on the defendant's alleged failure to timely respond to the plaintiff's requests for admissions. The plaintiff asserted that because the matters in her requests for admissions were deemed admitted pursuant to Rule 36(a) of the Federal Rules of Civil Procedure, there was no genuine issue of material fact and that she was entitled to summary judgment or judgment on the pleadings as a matter of law. 2015 WL 5655948 at *1. In response, the defendant argued that because the parties had not conducted the conference required by Rule 26(f) when the plaintiff served her requests for admissions, the plaintiff's requests for admissions were premature under Rule 26(d)(1) and her failure to respond to those requests could not be deemed an admission. *Id.*

The Court found that Rule 26(a)(1) prohibited the service of requests for admissions before the parties held the required Rule 26(f) conference. The Court then held that the defendant was not required to respond to the plaintiff's premature requests for admissions and, consequently, the requests for admissions were not deemed admitted under Rule 36(a). *Id.* at *2.

³ In *Long*, the plaintiff sought summary judgment based on the defendant's failure to respond to requests for admissions the plaintiff had served before the parties had conducted a Rule 26(f) conference. 2010 WL 3338559 at *2. The Court stated that Rule 26(d)(1) of the Federal Rules of Civil Procedure prohibited a party from seeking discovery "from any source" before the parties had conferred as required by Rule 26(f) and held that any discovery, including requests for admissions, were therefore premature and could not support a motion for summary judgment. *Id.* at *2-3.

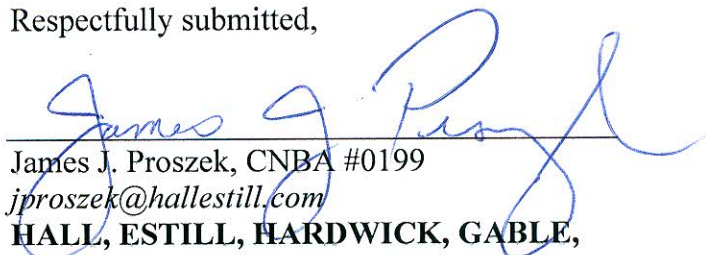
⁴ In *DIRECTV*, the defendant argued that he was entitled to summary judgment based upon the plaintiff's failure to answer his requests for admissions. The plaintiff argued that the parties had not conducted a Rule 26(f) conference when the defendant had served those requests for admissions. 302 F. Supp. 2d at 838. After noting that Rule 26(d) prohibited a party from seeking discovery from any source until the parties had conferred as required by Rule 26(f), the Court found that the defendant had served his requests for admissions prematurely and held that the plaintiff's failure to respond to those requests for admissions could not be deemed an admission. *Id.*

Here, Gilliland filed a motion to stay all discovery pending the disposition of the Criminal Case. Gilliland has timely appealed this Court's denial of that motion and that appeal is still pending. CNEC's motion to compel relates to discovery and is thus unquestionably a matter involved in the pending appeal. This Court is therefore without jurisdiction to order Gilliland to respond to CNEC's interrogatories or document requests.

CONCLUSION

CNEC's requests for admissions, which were served before the parties held the conference required by Fed. R. Civ. P. 26(f), were premature under Fed. R. Civ. P. 26(d)(1) and required no response. Gilliland's failure to respond to those requests can therefore not be deemed an admission thereof. Even if CNEC's requests for admissions were not premature, CNEC's motion addresses issues directly involved in Gilliland's appeal to the Supreme Court. This Court therefore lacks jurisdiction to enter an order deeming CNEC's premature requests for admissions admitted. Gilliland therefore respectfully requests this Court to deny CNEC's motion.

Respectfully submitted,



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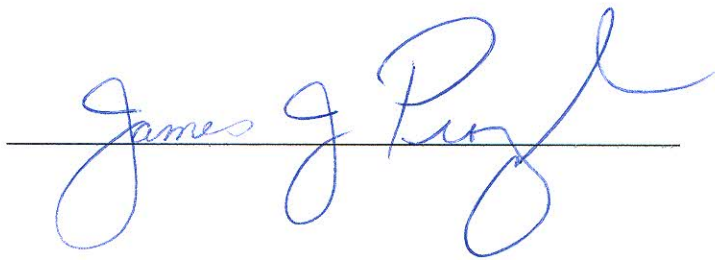
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**ATTORNEYS FOR DEFENDANT
KIMBERLIE GILLILAND**

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 22 day of February 2017, a true and correct copy of the above and foregoing instrument was sent via e-mail and U.S. Mail, with proper postage thereon fully paid, to:

Ralph F. Keen II
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Stilwell, OK 74960



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