

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

CHEROKEE NATION
DISTRICT COURT
KRISTI HONCOOYEA
COURT CLERK

2017 FEB 27 AM 8:46

FILED

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY

Defendant Kimberlie Gilliland ("Gilliland") submits her response to Plaintiff Cherokee Nation Education Corporation's ("CNEC") motion to compel Gilliland to respond to CNEC's premature interrogatories and request for production of documents.

INTRODUCTION

CNEC improperly served interrogatories and document requests before the parties held the conference required by Fed. R. Civ. P. 26(f). CNEC's interrogatories and document requests were therefore premature under Fed. R. Civ. P. 26(d)(1), are of no effect, and required no response. Even if CNEC's premature interrogatories and document requests were not void and of no effect, CNEC failed to comply with Fed. R. Civ. P. 37(a)(1) which required CNEC to confer with Gilliland in good faith to determine whether the discovery dispute could be resolved without court action. Finally, because CNEC's motion to compel addresses issues directly involved in Gilliland's appeal to the Supreme Court, this Court lacks jurisdiction to enter an order compelling Gilliland to answer CNEC's premature interrogatories and document requests. CNEC's motion to compel 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 interrogatories and document requests 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 allowed 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 interrogatories and document requests. 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 INTERROGATORIES AND DOCUMENT REQUESTS WERE SERVED IN VIOLATION OF FED. R. CIV. P. 26(d)(1) AND ARE THEREFORE OF NO FORCE AND EFFECT AND 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 and/or motions to compel. 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,

¹ Indeed, CNEC specifically states in its motion that it is bringing the motion "pursuant to the Federal Rules of Civil Procedure (FRCP) as made applicable to Cherokee civil actions by the Cherokee Code of Civil Procedure, LA-16-16 § 5 . . ." CNEC relies on the requirements of Rules 26, 33, 34 and 37 of the Federal Rules of Civil Procedure as the basis for its motion and claims that Gilliland purportedly stands in clear violation of these federal rules governing document production and responding to written interrogatories.

2015); accord, *Thompson v. Fred's Stores of Tennessee, Inc.*, 2015 WL 5655948 at *2 (S.D. Miss., Sept. 24, 2015).

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. CNEC's interrogatories and document requests, which were served in violation of Rule 26(d)(1), are therefore of no effect and Gilliland was not required to respond to them. *E.g.*, *Dixon*, 2016 WL 5017332 at *2; *Thompson*, 2015 WL 5655948 at *2; see *Kelley*, 2015 WL 7779701 at *2 n.5.²

II. CNEC FAILED TO COMPLY WITH THE MEET AND CONFER REQUIREMENTS OF FED. R. CIV. P. 37(a)(1)

Pursuant to Fed. R. Civ. P. 37(a)(1), every motion to compel discovery, "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1); *Johnson v. Old Republic Ins. Co.*, 2012 WL 1672995 at *1 n.2 (N.D. Okla., May 14, 2012). Rule 37(a)(1), which specifically applies to discovery requests, therefore requires that, before filing a motion to compel, the party seeking discovery must confer or attempt to confer, in good faith, with the opposing party to determine whether the discovery can be obtained without a court order. *Khalil v. Transunion, LLC*, 2008 WL 4642857 at *3 (E.D. Mich., Oct. 20, 2008). Since CNEC has not complied with Rule 37(a)(1), CNEC's motion to

² Rule 26(d)(2) does allow for early service of Rule 34 document requests. However, that "early service" rule provides that document requests may not be delivered less than 21 days after service of the summons and complaint and that the request is not considered to have been served until the first Rule 26(f) conference. Fed. R. Civ. P. 26(a)(2)(A), (B). Since CNEC served its document requests less than 21 days after Gilliland was served with process, and there has been no Rule 26(f) conference here, Gilliland's responses are not yet due, even under this expedited procedure.

compel should be denied. *See, e.g., Johnson*, 2012 WL 1672995 at *2; *Khalil*, 2008 WL 4642857 at *3.

III. THIS COURT LACKS JURISDICTION TO ENTER AN ORDER COMPELLING GILLILAND TO RESPOND TO CNEC'S INTERROGATORIES AND DOCUMENT REQUESTS

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.

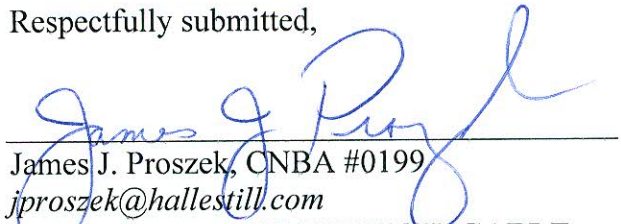
Here, Gilliland filed a motion to stay all discovery pending the disposition of the Criminal Case. Gilliland has timely appealed this Court's denial of that motion and that appeal is still pending. CNEC's motion to compel relates to discovery and is thus unquestionably a matter involved in the pending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

CONCLUSION

CNEC's interrogatories and document requests, 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), are therefore of no effect, and required no response. Even if CNEC's prematurely served interrogatories and document requests were not void and of no effect, CNEC failed to comply with Fed. R. Civ. P. 37(a)(1) which required CNEC to confer with Gilliland in good faith to determine whether the discovery dispute could be resolved without court action. Finally, because CNEC's motion to compel addresses issues directly involved in Gilliland's appeal to the

Supreme Court, this Court lacks jurisdiction to enter an order compelling Gilliland to answer CNEC's premature interrogatories and document requests. Gilliland therefore respectfully requests this Court to deny CNEC's motion to compel.

Respectfully submitted,



James J. Proszek, CNBA #0199

jproszek@hallestill.com

**HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.**

320 South Boston Avenue, Suite 200

Tulsa, OK 74103-3706

Telephone (918) 594-0400

Facsimile (918) 594-0505

**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
KEEN LAW OFFICE, P.C.
205 W. Division
Stilwell, OK 74960

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