10-07369-A

DALLAS COUNTY, TEXAS

2011 OCT 14 PM 3:43

CAUSE NO. ~~096-206966-04~~

HEATHER DOBROTT,	§	**IN THE COUNTYCOURT**
	§	
Plaintiff,	§	
	§	
v.	§	**COURT AT LAW 1**
	§	
TIMOTHY S. DARNELL,	§	
	§	
Defendant.	§	**DALLAS COUNTY, TEXAS**

DEFENDANT'S MOTION TO QUASH ALLEGED DEEMED ADMISSIONS AND ALTERNATIVELY, TO UNDEEM ADMISSIONS AND SET ASIDE

Defendant Timothy S. Darnell ("Defendant"), files this Motion to Quash Alleged Deemed Admissions and, alternatively, to Undeem Admissions and Set Aside and would show the Court as follows:

I. Introduction and Summary

1. Defendant seeks to have Plaintiff's motion to deem admissions quashed because the requests for admissions were untimely served, as a matter of law, under the applicable discovery period. In the alternative, Defendant asks the Court to undeem such admissions and set them aside.

2. A year ago, on October 20, 2011, Plaintiff filed her Original Petition, alleging in principal that Defendant made defamatory statements on the internet. The case was filed under Discovery Level 2, under which the discovery period closes, **at a minimum,** 30 days before the initial trial setting, which was set for September 20, 2011. Thus, the discovery period closed on August 21, 2011.

4. Per Rule 190.3 and comment 4, all written discovery must be served at least 30 days before the discovery period closes, such that "the deadline for responding will be within

the discovery period." TEX. R. OF CIV. P. 190 cmt 4

5. Thus, all written discovery in this case needed to be served, at the latest, by **July 22, 2011.**

6. Plaintiff states that her requests for admission were served via certified mail on July 29, 2011, and, that they were not received by Defendant until August 1, 2011. Under any calculation, Defendant's deadline for responding to the requests for admission would not have been within the discovery period, and thus per Rule 190 and applicable case law, they were untimely as a matter of law.

II. Argument and Authority

I. The Requests Were Untimely As A Matter of Law

7. Texas Rule of Civil Procedure 190, Comment 4, states:

> "unless otherwise ordered or agreed, parties seeking discovery must serve requests sufficiently far in advance of the end of the discovery period that the deadline for responding will be within the discovery period."

As the Rule and Comment make clear, "unless otherwise ordered or agreed" discovery requests must be made "sufficiently far in advance of the end of the discovery period that the deadline for responding will be within the discovery period."

8. Moreover, as the Rule and Comment further mandates a party seeking discovery that will not be responded within the discovery period must first seek an order from the Court or agreement of the party before propounding such discovery.

9. In this case, the discovery period closed, at the latest, on August 21, 2011, thirty days before the initial trial of September 20, 2011. *See* Tex. R. Civ. P. 190.3 (providing that the discovery period closes in at a minimum 30 days before trial).

10. Applying these Rules, case law holds that all written discovery must be served by at least 60 days before the initial trial setting. *Dolenz v. Pirates Cove Water Supply And Sewage Service Corp.*, 2004 WL 2535396 at *3 (Tex. App.—Corpus Christi 2004, no pet.) ("Interrogatories and requests for disclosure, production, and admissions must be served on the opposing party no later than thirty days before the end of the discovery period.")

11. Accordingly, all written discovery had to be served, at the latest, by **July 22, 2011**, absent court order or agreement.

12. Plaintiff states in her Motion to Deem Admissions that the requests for admission were not put in the mail until July 29, 2011 and were not received by Defendant until August 1, 2011. This is well outside the July 22, 2011 deadline and, as a matter of law, is untimely.

II. Plaintiff's Untimely Requests for Admission Must Be Quashed

13. As discussed above, Plaintiff's requests for admission were untimely under the applicable discovery period. Case law holds that in such situations the requested discovery should be quashed. *See Dolenz v. Pirates Cove Water Supply And Sewage Service Corp.*, 2004 WL 2535396 at *3 (Tex. App.—Corpus Christi 2004, no pet.).

14. In *Dolenz*, the court quashed untimely discovery request holding that such quash was mandated under Rule 190. As the court noted, Rule 190 mandates that "[u]nless otherwise ordered or agreed, parties seeking discovery must serve requests sufficiently far in advance of the end of the discovery period so that the deadline for responding will be within the discovery period." *Id.* (citing *Pape v. Guadalupe-Blanco River Auth.*, 48 S.W.3d 908, 913 (Tex. App.—Austin 2001, pet. denied). Thus "[i]nterrogatories and requests for disclosure,

production, and admissions must be served on the opposing party no later than thirty days before the end of the discovery period." *Id.* The court further noted that "the discovery requests bear a certificate of service indicating that the documents were mailed December 27, 2002 [and] Appellee did not receive the discovery requests until approximately January 2, 2003." *Id.* This was outside the discovery period and such discovery was quashed. *Id.* (holding quash of untimely discovery requests were warranted).

III. It Was Plaintiff's Burden to Obtain Leave of Court or Agreement to Serve the Untimely Requests.

15. Moreover, it is important to note that it was Plaintiff's burden to obtain either "a court order or agreement" before serving the untimely requests. This requirement provides an additional basis to quash under the case law and Rule 190. *See Goffney v. O'Quinn*, 2004 WL 2415067 at 13, (Tex. App.—Houston [1st Dist.] 2004, no pet). In *Goffney v. O'Quinn*, the Court noted this fundamental requirement:

> the record contains no motion by appellants asking for leave to file the request late. The trial court would not have abused its discretion had it denied appellants' fifth supplemental motion to compel because the request for production that appellants sought to compel was untimely.

16. Similarly, *Robinson v. Lubbering*, in the court held that, absent leave of court via an order, discovery that cannot be responded to within the discovery period is not allowed. 2011 WL 749197 at *7-8 (Tex. App.—Austin 2011, no hist.)

17. Applying this case law and the clear mandate of Rule 190 to get leave of court prior to propounding late discovery, Plaintiff had the burden to get an order allowing such requests for admission. Plaintiff's failure to meet that obligation provides an additional basis to quash the admissions.

IV. In the Alternative, Should the Court Not Quash the Admissions, Plaintiff Ask that the Admissions be Undeemed or Set Aside

18. Texas Rule of Civil Procedure 198.3, provides, in pertinent part:

> A matter admitted under this rule is conclusively established as to the party making the admission unless the court permits the party to withdraw or amend the admission. The court may permit the party to withdraw or amend the admission if:
>
> (a) the party shows good cause for the withdrawal or amendment; and
>
> (b) the court finds that the parties relying upon the responses and deemed admissions will not be unduly prejudiced and that the presentation of the merits of the action will be subserved by permitting the party to amend or withdraw the admission.

19. In this case, approximately 10 months after the case was filed, Plaintiff served 186 requests for admission. These requests were in addition to a volume of discovery Plaintiff had already propounded in this case. Indeed, Plaintiff was even given "letters rogatory" to get additional discovery. However, finding that Plaintiff had no evidence to support her clams, Plaintiff served untimely request for admission on Defendant. Plaintiff now seeks to use these untimely 186 admissions to support her entire case.

20. Here, good cause exists to allow withdrawal of the deemed admission. First, Plaintiff's requests for admission are untimely. Plaintiff as the party seeking to use the deemed admissions must show that the requests were properly served within the discovery period. This is Plaintiff's burden if she is going to use the admission to prove her case. As discussed above, Plaintiff cannot show the requests for admissions were properly served within the discovery period. Second, Plaintiff has already had a volume of discovery in this matter and should have facts supporting her case if such exist. Third, Defendant was pro se at the time of these requests and had already received numerous filings and requests from Plaintiff—knowing that the case was about to go to trial, Defendant misfiled and failed to calendar these requests.

Defendant's failure to respond to them was due to accident or mistake, and it was not an intentional act or due to conscious indifference.

21. Further, Plaintiff will not be unduly prejudiced and the merits of the action will be subserved by permitting withdrawal of the admission. First, Plaintiff has already had a volume of discovery in this matter and if evidence and facts supporting her case exist she would already have them. Plaintiff has not been relying on these requests for admission the entire discovery period or any significance of time—instead they were filed outside the discovery period and at the end of the case. Second, the merits of this case mandate withdrawal of the admissions. Just weeks before trial, Plaintiff served 186 requests for admission. Now, Plaintiff wants to use these request to get essentially a default judgment. If allowed, Defendant would have no opportunity to put on any evidence or refute any of Plaintiff's allegations. In fact, Plaintiff would likely not have to put on any evidence other than the admissions. **These admissions are not for a particular issue or fact, they are the entire case.** This is the situation the Rule anticipated. The merits of this case can only be subserved by allowing withdrawal of the admissions.

III. Conclusion

For these reasons, Defendant asks the Court to quash Plaintiff's untimely requests for admissions. In the alternative, Defendant asks the Court to undeem and set aside Plaintiff's alleged deemed admissions.

Respectfully submitted,

URQUIDEZ LAW FIRM, LLC

/s/ Thomas J. Urquidez
Thomas J. Urquidez
State Bar No. 24052001
3010 LBJ Freeway, Suite 930
Dallas, Texas 75234
Phone: 214-420-3366
Fax: 214-206-9802
ATTORNY FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this document has been served on all parties of record in accordance with Texas Rule of Civil Procedure 21a.

/s/ Thomas J. Urquidez
Thomas J. Urquidez

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF COLLIN §

BEFORE ME, the undersigned notary, on this day, personally appeared Timothy Darnell, a person whose identity is known to me and after I administered the oath stated as follows:

"My name is Timothy Darnell. I am over the age of 21 years and am competent to make this Verification. I have read the foregoing instrument entitled "DEFENDANT'S MOTION TO QUASH ALLEGED DEEMED ADMISSIONS AND ALTERNATIVELY, TO UNDEEM ADMISSIONS AND SET ASIDE" and that the factual allegations made in it are within my personal knowledge and are true and correct.

FURTHER, AFFIANT SAYTH NOT.

Timothy Darnell, Affiant

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this 14th day of October, 2011, to certify which witness by hand and official seal.

DEBRA ANN BIGGS
Notary Public
State of Texas
Comm. Expires 11-04-2011

Notary Public in and for the State of Texas