

COURT OF THE JUDICIARY CASE NO. 50



IN THE MATTER OF:
ANITA KELLY
Circuit Judge, Fifteenth Judicial Circuit

ORDER

On March 28, 2018, the Judicial Inquiry Commission ("the Commission") served requests for admission on Judge Anita Kelly. See Rule 36, Ala. R. Civ. P. On April 9, 2018, Judge Kelly filed a motion for a protective order and a motion to quash the Commission's requests for admission. The Commission filed a response on April 9, 2018.

On April 12, 2018, this Court held a conference by phone with counsel for Judge Anita Kelly and counsel for the Judicial Inquiry Commission ("the Commission") regarding Judge Kelly's April 9, 2018, motion.

In her motion, Judge Kelly argued the following regarding the Commission's requests: (1) the requests are so numerous that they are overly burdensome,¹ particularly because the

¹In support of the first argument, Judge Kelly contends that the requests will require her to make approximately 1,900 separate responses.

trial of this matter will begin on May 7, 2018;² and (2) the requests represent an improper attempt by the Commission to shift the burden of proof to Judge Kelly. During the phone conference, counsel for Judge Kelly further explained that counsel did not think that the Commission's requests were appropriate under Rule 36, Ala. R. Civ. P., because, counsel argued, the admission or denial of them would create "inferences" that need further explanation.

Rule 36, Ala. R. Civ. P., provides, in relevant part:

"A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the

²In its requests for admission, the Commission stated: "If any fact cannot be admitted, for each such fact, please explain in detail why the fact cannot be admitted as true, identifying each portion Judge Kelly contends is untrue."

Judge Kelly objected to this statement, arguing:

"[The Commission's] request would impose a requirement on Judge Kelly to give a detailed statement of reasons not only where she in good faith cannot admit or deny the request, but also for every request she denies--a requirement not authorized by Rule 36[, Ala. R. Civ. P.]"

Judge Kelly's April 9, 2018, motion, p. 2 n.4 (emphasis in the original).

During the phone conference, the Commission stated that it would withdraw this portion of its requests.

request. ...

"Each matter of which an admission is requested shall be separately set forth. ... If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it."

The Court understands that the requests are indeed voluminous in nature. The information sought, however, is precisely the type information covered by Rule 36, Ala. R. Civ. P., and Judge Kelly's argument that the requests are overly burdensome is not well founded under the circumstances of this case.

The Commission's requests for admission track, almost verbatim, the allegations of the second amended complaint filed in this matter. The individual requests for admission

are numbered to correspond with the numbered paragraphs of the second amended complaint. Judge Kelly objects to the requests for admission on the basis that they seek admissions on many of the facts alleged in the complaint. She cites Perez v. Miami-Dade County, 297 F.3d 1255, 1269 (11th Cir. 2002), for the proposition that "where the defendant has answered [the] complaint, it is 'inappropriate for a plaintiff to reserve the complaint in the form of a request for admissions in order to require the defendant to admit or deny nearly every paragraph of a complaint it has already answered.'" That decision, however, is distinguishable from the facts of this case.³ Further, there is authority contrary to the position espoused in Perez.⁴

³In Perez, the defendant county denied in an answer the basic allegations of the complaint. The county failed, however, to timely respond to the requests for admission, which had also been served with the complaint. The district court deemed the matters admitted, but the United States Court of Appeals for the Eleventh Circuit held that the district court had abused its discretion under the circumstances. Among other circumstances not present here, the Eleventh Circuit noted that at the time the requests were served, it was "simply too early for the defendant, having not yet received the allegations, to perceive what facts should or should not be contested." 297 F.3d at 1268-69. Further, the district court had "failed to apply properly the two-part test of Rule 36(b) [, Fed. R. Civ. P.,] in considering the defendants' motion to withdraw admissions. 297 F.3d at 1269.

⁴See, e.g., United States v. Young, (No. 87 CIV 9159, Sept. 10, 1990) (S.D.N.Y. 1990) (not reported in F. Supp.)

The vast majority of the Commission's requests concern purely factual matters and whether and when those matters occurred. Further, those factual matters appear to be simple to admit or deny.

The initial complaint in this matter was filed August 16, 2017. The complaint was amended on December 6, 2017, and then amended, in response to a deadline set by this Court, for the second and final time on February 7, 2018. The Commission, according to Judge Kelly, has provided Judge Kelly more than 450 case files from which most of the factual allegations of the complaint and the corresponding requests for admission arise. Additionally, beginning December 4, 2017, this Court, in response to Judge Kelly's request, ordered the Administrative Office of Courts to provide Judge Kelly digital access to files, emails, etc. Thus, Judge Kelly has had access for months to all case files upon which the

("The mere fact that a party has previously denied the matter about which an admission is sought does not obviate the need to respond to a Rule 36 request for admissions."). See also Advisory Committee Note to Rule 36, Fed. R. Civ. P. ("Courts have ... divided on whether an answering party may properly object to request for admission as to matters which that party regards as 'in dispute.' ... The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial").

allegations of the complaint are based. Further, because the Commission has documented all the allegations in the complaint for which it seeks an admission or denial of fact, this Court is not persuaded by Judge Kelly's argument that the Commission is trying to inappropriately shift the burden of proving its case.

As noted above, counsel for Judge Kelly expressed concern regarding "inferences" to be drawn from her admission or denial of the Commission's requests. Concern over "inferences," however, is not a proper basis for this Court to excuse Judge Kelly from responding to the Commission's requests under Rule 36, Ala. R. Civ. P. If Judge Kelly desires to present additional evidence and arguments regarding what inferences to draw from the facts--as well as any relevant defenses--she may do so at the hearing in this matter scheduled to begin on May 7, 2018.

Judge Kelly's April 9, 2018, motion is **DENIED**.

ORDERED this 13th day of April, 2018.



J. MICHAEL JOINER
CHIEF JUDGE
COURT OF THE JUDICIARY