

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2017 OCT -2 PM 3:11

ROBIN CARTER MAYES)
CANDIDATE AT-LARGE)
PRO SE,)
Petitioner,)

VS.)

Case No. CV-2017-273

CHEROKEE NATION ELECTION)
COMMISSION, CHEROKEE NATION)
OFFICE of the ATTORNEY GENERAL,)
TODD HEMBREE, an individual,)
SHAWNA CALICO, an individual,)
TERESA HART, an individual,)
MARTHA CALICO, an individual)
CAROLYN ALLEN, an individual,)
PAM SELLERS, an individual,)
JOHN DOE, unknown individuals,)
Respondents.)

SPECIAL APPEARANCE, PLEA TO JURISDICTION OF THE
COURT AND MOTION TO DISMISS AND/OR QUASH ANY
PURPORTED SERVICE HEREIN

COMES NOW the Respondent, Cherokee Nation Election Commission (hereinafter "Commission") and Shawna Calico, Teresa Hart, Martha Calico, Carolyn Allen and Pam Sellers, in their capacity as Commissioners of the Cherokee Nation Election Commission and all appearing specially for purposes of this Motion only and for their Special Appearance, Plea to Jurisdiction of the Court and Motion to Dismiss the Amended Petition for Writ of Mandamus and Declaratory Judgment of Robin Carter Mayes, Petitioner, on file herein and/ or Quash Any Purported Service herein, hereby respectfully submits the following:

The Commission hereby incorporates into this Special Appearance, Plea to Jurisdiction of the Court and Motion to dismiss, by reference its SPECIAL APPEARANCE AND MOTION TO DISMISS filed herein on June 14, 2017 (including Pleadings specifically incorporated therein by reference), as though fully set forth herein, and adopts such in support of this Motion; and, further, incorporates herein its Special Appearance and Supplement to Motion to Dismiss (including Pleadings specifically incorporated therein by reference) as though fully set forth herein, and adopts such in support of this Plea and Motion; and, further, incorporates herein the Special Limited Entry of Appearance and Motion to Dismiss Amended Petition of the Attorney General filed herein on this date and adopts such in support of this Motion.

PLEA TO JURISDICTION OF THE COURT AND MOTION TO DISMISS

COMES NOW the Respondent, Cherokee Nation Election Commission and (hereinafter "Commission") and Shawna Calico, Teresa Hart, Martha Calico, Carolyn Allen and Pam Sellers, in their capacity as Commissioners of the Cherokee Nation Election Commission (hereinafter "Commissioners") and all appearing specially for purposes of this Plea to Jurisdiction of the Court and Motion to Dismiss Amended Petition for Writ of Mandamus and Declaratory Judgment of Robin Carter Mayes, Petitioner, on file herein and/or Quash Any Purported Service herein, for lack of service of process and jurisdiction of the Court and hereby respectfully submits the following:

PROPOSITION

PETITIONER HAS FAILED TO ISSUE AND SERVE SUMMONS ON THE
COMMISSION AND COMMISSIONERS AS IS REQUIRED IN THIS
CASE TO GIVE THE DISTRICT COURT JURISDICTION
OVER THE COMMISSION AND COMMISSIONERS

STATEMENT OF FACTS

The Commission. Summons was not issued and served on the Commission as required by law upon filing of the Original Petition in this case and the Commission has not entered an appearance herein, except by special appearance contesting the jurisdiction of the Court.

The Petitioner was pro se, which may explain the failure to issue and service summons; and, Petitioner subsequently obtained an attorney who has filed an Amended Petition to which this Special Appearance and Motion is addressed.

The Certificate of Mailing attached to the Amended Petition certifies that it was mailed to the office of the Attorney General and to the Counsel for the Commission on August 25, 2017; however, no copy of the Amended Petition mailed on such date was received by either of the parties.

On September 11, 2017, Attorney for the Election Commission received from the Attorney for Petitioner, a Certified Mail Return Receipt Requested, which was mailed on September 8, 2017, (Copy of Envelope attached.), containing the Amended Petition (No Summons Enclosed and from the records of the Cherokee District Court Clerk non issued.) Said Certified Mail was not restricted to addressee only and was signed for by parties receiving the mail not employees

or agents of attorney for the Commission.

In addition, even if properly summons were properly issued and mailed, Attorney was not and is not authorized to acceptance service of process on behalf of the Commission. It is well established law that unless specifically authorized, service upon an attorney for a party is not valid service of process on such party.

A Summons has never been issued and served on the Commission in this case.

The Commissioners. Petitioners have purported to add the Commissioners as additional Respondents in this Case.

Summons was not issued and served on the Commissioners as required by law upon filing of the Amended Petition in this case and the Commissioners have not entered an appearance herein, except by this special appearance contesting the jurisdiction of the Court.

On September 11, 2017, the Mail Room of the Cherokee Nation received from the Attorney for Petitioner, addressed to each Commissioner, a Certified Mail Return Receipt Requested, which was mailed on September 8, 2017, (Copy of Envelope attached.), containing the Amended Petition (No Summons Enclosed and from the records of the Cherokee District Court Clerk non issued.) Said Certified Mail was not restricted to addressee only and was signed for by Cherokee Nation Mail Room Employees. Such Envelopes were later the same day delivered to the Commission Office and subsequently available to the Commissioners at their visit to the

Commission Office.

In addition, even if properly summons were properly issued and mailed, the Cherokee Nation Mail Room Employees, nor Commission Staff, are authorized to acceptance service of process on behalf of the Commissioners.

A Summons has never been issued and served on the Commissioners in this case.

Approval by the Court of this haphazard method of Service of Process would present many issues and questions:

1. When would be the answer date, since the Petitioner may set the Answer date not less than 20 days from service? Is no answer due?

2. What other types of service is available? Regular Mail, E-Mail, leaving on the doorstep of the Respondent or his or her neighbor, an ad in the classified, leaving a message on the answering machine? Facebook?

The above questions, while they may appear extreme, are perfect examples why the due process clauses of the United States Constitution and the Cherokee Nation Constitution require Issuance and Service of Summons and Process to provide a Court with Jurisdiction to render judgment in a case such as the instant case.

ARGUMENT AND AUTHORITY

Section 1 of Title 12 (Civil Procedure) of the Cherokee Nation Code Annotated (hereinafter "CNCA") provides:

"A. The Federal Rules of Civil Procedure shall be used in Cherokee Nation courts in all suits of a civil nature whether cases at law or in equity unless superseded by a Cherokee Nation rule of civil procedure."

As shown in the authorities cited in the previous Motion of the Commission and incorporated herein by reference, the Federal Rules of Civil Procedure clearly require issuance and service of summons to give this court personal jurisdiction in this case and to meet due process requirements of the United States and Cherokee Nation Constitution.

The Commission previously filed a Special Appearance in this case and the Court has ordered that since the Commission appeared they had actual notice and deemed them served as of the date of their specially appearing Court Appearance on June 16, 2017. There is no constitutional, statutory or case law for such Order. Actually, the law is quite clear that a Defendant may appear specially to contest the jurisdiction of the Court and to contest the proper issuance and service of summons.

In this case, no summons was even issued must less served.

The Court found in its Order filed June 22, 2017, that District Court Rule 3(5) is ambiguous and conflicts with Cherokee Nation Law and Federal Rules of Civil Procedure, apparently relying on such Court Rule to find that service was sufficient.

Section 1205 of Title 12 of the CNCA relating to Declaratory Judgment (for which Petitioner has asked) provides in paragraph B. thereof that the action shall be brought in the county where the Defendant or any of them reside or may be served with summons, clearly indicating the intent of the Council that summons be served

on defendants in Declaratory Judgment actions.

Supreme Court Rules and Procedures in Rule 56 provides that summons and certificates of service shall not be included in the record on appeal unless ordered by the Supreme Court, again indicating that the Supreme Court envisioned Summons and Service to exist in each case appealed from the District Court.

Further, Supreme Court Rules and Procedures in Rule 11 provides:

"A copy of the petition and a copy of the summons issued by the Clerk of the Supreme Court shall be served by the Petitioner or his/her representative by certified mail return receipt requested or by personal service by a process server licensed by the State of Oklahoma. Return of Service shall be Certified by the individual accomplishing such service and shall be filed with the Court Clerk of the Supreme Court."

The Courts reliance on District Court Rule 3.5 is misplaced.

The Supreme Court has Rule 7 which is the same identical Rule for the Supreme Court as Rule 3 for the District Courts. The Supreme Court would not logically adopt a different rule for issuance and service of summons with a petition for the District Court than that which they have for the Supreme Court.

Another indication of the Supreme Court's intent that Rule 3. not apply to Petitions, Issuance of Summons and Service is that Paragraph 2. b. requires that the filing by ". . . email must reflect the sending parties name, address, bar number, phone number, email address, case name and case number." (emphasis mine). A party filing a Petition by E-Mail will not have the case number until the Petition is filed; therefore, the Supreme Court did not

intend the Rule to apply to service of process on filing of a petition, and the said Rule does not provide for it to be used to substitute for issuance and service of summons.

Clearly, the Supreme Court in Rule 7 for its Court and in Rule 3 for the District Court intended the Fax Rules to apply only to "affidavits, pleading, motions and other documents" filed after the initial petition.

A Court Rule must be interpreted to be consistent with the Constitution and Statutory Law unless clearly in conflict therewith. The Court admits in the Order that the Rule is ambiguous and her interpretation conflicts with Cherokee Law and the Federal Rules of Civil Procedure which the Council and the Supreme Court have adopted. Thus, the correct interpretation of such Rule is that it applies only to documents following the petition.

Literally, District Court Rule 3.5 does not apply to the initial Petition. The District Court Rule 3.5 states that the ". . . fax/email must also be served concurrently by fax, email, hand-delivery or mail on all other parties to the appeal" (emphasis mine); therefore, only applying to Pleadings filed with the District Court Clerk relating to an appeal to the Supreme Court (which this case is not).

This is not an appeal, but an original action in District Court and every Court in the United States known to this writer requires issuance and service of Summons to obtain jurisdiction, to comply with due process constitutional requirements. The Courts of

the Nation should also follow this well recognized principal of law, as provided by the Cherokee Nation Council in the CNCA and the Cherokee Nation Supreme Court in the Supreme Court Rules and District Court Rules.

WHEREFORE, the Cherokee Nation Election Commission and the Commissioners respectfully request that the Court dismiss the Petition for Writ of Mandamus and Declaratory Judgment of Robin Carter Mayes, Petitioner, on file herein and/or quash any purported service in this case, for failure to issue and serve summons and process on the said Respondents; and, further prays for such other and further relief to which the Commission and Commissioners may be entitled and which the Court may deem just and equitable.

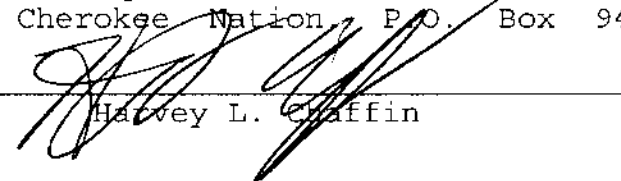
Cherokee Nation Election
Commission, and the Commissioners,
in their capacity as Commissioners
of the Commission, Respondents

BY: 

HARVEY L. CHAFFIN, CNBA#0459
Attorney for Respondents
215 W. Shawnee
Tahlequah, OK 74464
918/453-2800

CERTIFICATE OF MAILING

I, Harvey L. Chaffin, do hereby certify that on this 2nd day of October, 2017, I mailed by first class mail, with postage prepaid thereon, a true and correct copy of the within and foregoing Answer to A.J. Garcia, 504 East Willis Road, Tahlequah, Oklahoma 74464, attorney for Robin Mayes and to Chrissi Nimmo, Sr. Assistant Attorney General, Cherokee Nation, P.O. Box 948, Tahlequah, OK 74465.


Harvey L. Chaffin