



FILED IN DISTRICT COURT
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FEB 25 2022

RICK WARREN
COURT CLERK

108

CHRISTOPHER AVELLONE,

Plaintiff,

v.

KELLY RAE BRISTOL,

Defendant.

Case No. CJ-2021-4340

The Honorable Anthony L. Bonner

**PLAINTIFF'S MOTION TO STRIKE THE MOTION
TO DISMISS AND REQUEST FOR JUDICIAL NOTICE
OF DEFENDANT KELLY RAE BRISTOL**

Plaintiff Christopher Avellone ("Plaintiff") hereby moves this Court for an order striking the Motion to Dismiss ("Motion to Dismiss") and Request for Judicial Notice in Support of Defendant's Motion to Dismiss ("Request for Judicial Notice") that were filed by Defendant Kelly Rae Bristol ("Defendant") with this Court on February 9, 2022. The Motion to Dismiss was filed out of time and without leave of court, and is thus a nullity that should be stricken from the record. Further, because the Request for Judicial Notice is in support of the Motion to Dismiss, which is a nullity, this Request should also be stricken from the record. In support of this Motion to Strike, the Plaintiff shows the Court as follows:

1. On October 13, 2021, the Plaintiff originally filed this action in this Court. *See* Petition, Case No. CJ-2021-4340, Okla. Cnty., State of Okla., Oct. 13, 2021 (hereinafter "Petition").
2. The Defendant was properly served with process on November 3, 2021. *See* Return of Service, Case No. CJ-2021-4340, Okla. Cnty., State of Okla., Nov. 19, 2021.
3. On November 23, 2021, the Defendant removed this case from this Court to the United States District Court for the Western District of Oklahoma (the "Western District") on the

basis of diversity jurisdiction pursuant to 28 U.S.C. § 1332. *See Notice of Removal*, Case No. CJ-2021-4340, Okla. Cnty., State of Okla., Nov. 23, 2021. The Defendant asserted that diversity jurisdiction exists because Plaintiff (a citizen of California) **and** Defendant (a citizen of Oklahoma) are citizens of different states, and the amount in controversy **exceeds** \$75,000, exclusive of interest and costs. *See Notice of Removal*, ¶¶ A.5-6, B.7.

4. The Defendant removed the case on the same day that she was required to file an answer to the Petition in this Court under OKLA. STAT. tit. 12, § 2012.

5. Pursuant to Rule 81 of the Federal Rules of Civil Procedure, the Defendant was required to file an answer or present other defenses within seven (7) days of removal, or no later than November 30, 2021.

6. The Defendant completely disregarded this rule by failing to timely file an answer or otherwise plead. Instead, the Defendant waited until December 10, 2021, to file a motion to dismiss in the Western District, **which was filed out of time and without leave of court**. *See Docket for Western District Case No. CIV-21-1108-SLP (“WD Docket”)* attached hereto as Exhibit 1. The same day, the Defendant also filed a request for judicial notice in support of her motion to dismiss in the Western District. *See WD Docket* (Exhibit 1).¹

7. On December 21, 2021, the Plaintiff filed a Motion to Remand in the Western District, seeking remand of the case back to this Court because the Defendant’s removal violated the “forum-defendant rule” set forth in 28 U.S.C. § 1441(b)(2). Under the forum-defendant rule, “[a] civil action otherwise removable solely on the basis of jurisdiction under section 1332(a) of

¹ The Western District stayed the Plaintiff’s deadline to respond to the federal court motion to dismiss and request for judicial notice until further order of the Western District after it had ruled on the Motion to Remand. *See WD Docket* (Exhibit 1).

this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2).

8. The Defendant did not file any opposition or response to the Plaintiff’s Motion to Remand, which was ultimately granted by the Western District. The Western District also awarded the Plaintiff his costs and attorneys’ fees associated with the removal and remand because the Western District found that there was no “objectively reasonable basis” for removal due to the forum-defendant rule. *See* WD Docket (Exhibit 1).

9. On February 9, 2022, the Defendant filed the Motion to Dismiss and Request for Judicial Notice in this Court.²

10. The Plaintiff takes issue with the Defendant’s repeated disregard for the rules of procedure in both the federal court and this Court following remand.

11. As discussed above, the Defendant **improperly removed** this case to the Western District, **failed to timely file an answer or present defenses** by the deadline required under Rule 81 of the Federal Rules of Civil Procedure, and then filed a motion to dismiss **out of time and without leave of court**.

12. After remand, the Defendant has continued to disregard court rules by filing the Motion to Dismiss in this Court **out of time and without leave of court**.

13. It is well established under Oklahoma law that the filing of an answer or motion to dismiss out of time and without leave of court is a **nullity**. *Durant Civic Foundation v. The Grand*

² Also on February 9, 2022, the Defendant improperly filed a “Notice Following Remand,” which purports to give notice to this Court of all documents filed in the Western District that Defendant contends should be incorporated and made a part of this Court’s record and docket. This “Notice Following Remand” is improper because, *inter alia*, the motion to dismiss and request for judicial notice filed in the Western District were filed out of time and without leave of court. Accordingly, they should not be made part of this Court’s record and docket.

Lodge of Okla. of the Indep. Order of Odd Fellows, 2008 OK CIV APP 54, ¶ 8, 191 P.3d 612, 614-15 (“The filing of an answer after the time permitted by the Oklahoma Pleading Code and without leave of court is a nullity, having no procedural effect.”); *Powers v. District Court of Tulsa Cnty.*, 2009 OK 91, ¶ 5, 227 P.3d 1060, 1066 (footnote omitted) (“Husband’s special appearance and motion to dismiss filed after his time to answer or otherwise plead without leave of court, or having been treated by the court as timely, is a nullity and of no effect.”); *see also Weldon v. Dunn*, 1998 OK 80, ¶ 6, 962 P.2d 1273, 1276 (Okla. 1998) (citing *Hunter v. Echols*, 1991 OK 114, ¶ 6, 820 P.2d 450, 452-53) (“An amended petition, untimely filed and filed without leave of court or consent of the opposing party, is a nullity It must be treated as if it was never filed.”)).

14. In light of these authorities, it is clear that because the Defendant’s Motion to Dismiss was filed out of time and without leave of court, it is a nullity and should be stricken from this Court’s record.

15. Further, because the Request for Judicial Notice has been filed in support of the Motion to Dismiss—a nullity—the Request for Judicial Notice should also be stricken from this Court’s record.

WHEREFORE, premises considered, the Plaintiff respectfully requests that this Court grant his Motion to Strike, and find that the Defendant’s Motion to Dismiss was filed out of time and is, thus, a nullity that must be treated as if it was never filed and stricken from the record. The Plaintiff further requests that this Court strike the Request for Judicial Notice, as it has been filed in support of the Motion to Dismiss, which is a nullity. Finally, the Plaintiff requests any such further relief as this Court deems just and equitable.

Respectfully submitted,



Eric D. Wade, OBA No. 19249
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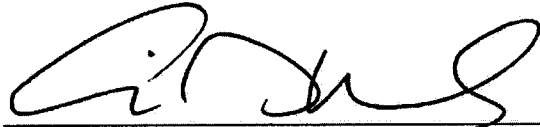
ATTORNEY FOR PLAINTIFF,
CHRISTOPHER AVELLONE

CERTIFICATE OF DELIVERY

☒ I hereby certify that on February 25, 2022, I served the attached document by United States Certified Mail, Return Receipt Requested on the following:

Scott E. Kiplinger
GABLE GOTWALS
499 W. Sheridan Avenue, Suite 2200
Oklahoma City, Oklahoma 73102

Attorney for Defendant



Eric D. Wade

**U.S. District Court
Western District of Oklahoma[LIVE] (Oklahoma City)
CIVIL DOCKET FOR CASE #: 5:21-cv-01108-SLP**

Avellone v. Bristol
Assigned to: Judge Scott L. Palk
Case in other court: District Court of Oklahoma County, CJ-21-04340
Cause: 28:1446 Petition for Removal

Date Filed: 11/23/2021
Date Terminated: 01/13/2022
Jury Demand: Plaintiff
Nature of Suit: 320 Assault Libel & Slander
Jurisdiction: Diversity

Plaintiff**Christopher Avellone**

represented by **Eric D Wade**
Rosenstein Fist & Ringold
525 S Main St
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LEAD ATTORNEY
ATTORNEY TO BE NOTICED

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V.

Defendant**Kelly Rae Bristol**

represented by **Prescott E Kiplinger**
Gable & Gotwals-OKC
499 W Sheridan Ave
BOK Park Plaza
Suite 2200
Oklahoma City, OK 73102
405-235-5500
Fax: 405-235-2875
Email: skiplinger@gablelaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
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11/23/2021	<u>1</u>	NOTICE OF REMOVAL from District Court of Oklahoma County, case number CJ-2021-4340 filed by Kelly Rae Bristol. (Attachments: # <u>1</u> Exhibit 1 - Petition, # <u>2</u> Exhibit 2 - Docket Sheet, # <u>3</u> Civil Cover Sheet)(kmt) (Entered: 11/23/2021)
11/23/2021		PAYMENT FOR A CIVIL CASE Filing fee \$ 402, receipt number AOKWDC-3804218. (Kiplinger, Prescott) (Entered: 11/23/2021)
11/29/2021	<u>2</u>	ENTRY of Appearance by Prescott E Kiplinger on behalf of Kelly Rae Bristol (Kiplinger, Prescott) (Entered: 11/29/2021)
12/10/2021	<u>3</u>	STRICKEN 12/10/2021, filing attorney account does not match signature (kmt). ENTRY of Appearance by Prescott E Kiplinger on behalf of Kelly Rae Bristol (Kiplinger, Prescott) (Entered: 12/10/2021)
12/10/2021	<u>4</u>	STRICKEN 12/10/2021, incorrect document (kmt). ENTRY of Appearance by Prescott E Kiplinger on behalf of Kelly Rae Bristol (Attachments: # <u>1</u> Exhibit 1 - Request for Admission Pro Hac Vice)(Kiplinger, Prescott) (Entered: 12/10/2021)
12/10/2021	<u>5</u>	MOTION for Leave to Appear Pro Hac Vice <i>Daniel L. Allender</i> Filing fee \$ 50, receipt number AOKWDC-3814418 by Kelly Rae Bristol. (Attachments: # <u>1</u> Exhibit 1-Request for Admission Pro Hac Vice)(Kiplinger, Prescott) (Entered: 12/10/2021)
12/10/2021	<u>6</u>	MOTION for Leave to Appear Pro Hac Vice <i>Jessica Pettit</i> Filing fee \$ 50, receipt number AOKWDC-3814434 by Kelly Rae Bristol. (Attachments: # <u>1</u> Exhibit 1-Request for Admission Pro Hac Vice)(Kiplinger, Prescott) (Entered: 12/10/2021)
12/10/2021	<u>7</u>	ORDER granting <u>5</u> Motion to Appear Pro Hac Vice of Daniel L. Allender; granting <u>6</u> Motion to Appear Pro Hac Vice of Jessica Pettit. Signed by Judge Scott L. Palk on 12/10/2021. (md) (Entered: 12/10/2021)
12/10/2021	<u>8</u>	STRICKEN ENTRY of Appearance by Prescott E Kiplinger on behalf of Kelly Rae Bristol (Kiplinger, Prescott) Pursuant to Notice from the Court on 12/17/2021 (md). (Entered: 12/10/2021)
12/10/2021	<u>9</u>	STRICKEN ENTRY of Appearance by Prescott E Kiplinger on behalf of Kelly Rae Bristol (Kiplinger, Prescott) Pursuant to Notice from the Court on 12/17/2021 (md). (Entered: 12/10/2021)
12/10/2021	<u>10</u>	MOTION to Dismiss by Kelly Rae Bristol. (Kiplinger, Prescott) (Entered: 12/10/2021)
12/10/2021	<u>11</u>	MOTION for Order <i>for Request for Judicial Notice</i> by Kelly Rae Bristol. (Attachments: # <u>1</u> Exhibit 1 - CA Complaint (Avellone v Barros, # <u>2</u> Exhibit 2 - Publicly Posted Tweets) (Kiplinger, Prescott) (Entered: 12/10/2021)
12/17/2021		NOTICE FROM THE COURT <u>8</u> Entry of Appearance, <u>9</u> Entry of Appearance are STRICKEN as they were incorrectly filed by Prescott E. Kiplinger instead of Daniel L. Allender and Jessica Pettit. Attorneys Allender and Pettit were directed in the Order <u>7</u> entered December 10, 2021 were directed to file entry of appearances consistent with LCvR 83.4. (md) (Entered: 12/17/2021)
12/21/2021	<u>12</u>	ENTRY of Appearance by Eric D Wade on behalf of Christopher Avellone (Wade, Eric) (Entered: 12/21/2021)
12/21/2021	<u>13</u>	MOTION to Remand to State Court <i>and for Award of Costs and Attorney Fees, with Combined Brief in Support</i> by Christopher Avellone. (Attachments: # <u>1</u> Exhibit 1)(Wade, Eric) (Entered: 12/21/2021)
12/27/2021	<u>14</u>	UNOPPOSED MOTION to Stay Case re <u>11</u> MOTION for Order <i>for Request for Judicial Notice</i> , <u>10</u> MOTION to Dismiss by Christopher Avellone. (Wade, Eric) (Entered: 12/27/2021)

01/04/2022	<u>15</u>	ORDER granting <u>14</u> Motion to Stay Deadline to Respond to Defendant's Motion to Dismiss and Request for Judicial Notice. The deadline for Plaintiff to respond to Defendant's Motion to Dismiss <u>10</u> and Request for Judicial Notice in Support of Defendant's Motion to Dismiss <u>11</u> is stayed until further order of this Court to be entered after the Court has ruled on Plaintiff's Motion to Remand <u>13</u> . Signed by Judge Scott L. Palk on 1/4/22. (md) (Entered: 01/04/2022)
01/13/2022	<u>16</u>	ORDER granting <u>13</u> Motion to Remand to State Court. Plaintiff shall file a short application for reasonable costs and fees associated with the removal of this Case, with supporting affidavits and time records, within seven days of the date of this Order. Defendant shall have five days after the filing of Plaintiffs submission to object to the amount requested in the application, but not to the award of costs and fees. If the parties stipulate to the amount of costs and fees, they may jointly file a Notice advising the Court of the same. Signed by Judge Scott L. Palk on 1/13/22. (md) (Entered: 01/13/2022)
01/20/2022	<u>17</u>	ENTRY of Appearance by Emily C Krukowski on behalf of Christopher Avellone (Krukowski, Emily) (Entered: 01/20/2022)
01/20/2022	<u>18</u>	MOTION for Attorney Fees <i>and Costs</i> by Christopher Avellone. (Attachments: # <u>1</u> Affidavit Exhibit 1)(Wade, Eric) (Entered: 01/20/2022)
02/01/2022	<u>19</u>	ORDER granting <u>18</u> Motion for Attorney Fees. Plaintiff is awarded a total sum of \$6,320.94. Signed by Judge Scott L. Palk on 2/1/2022. (md) (Entered: 02/01/2022)

PACER Service Center			
Transaction Receipt			
02/24/2022 17:10:23			
PACER Login:	ewade19249	Client Code:	Avellone / Bristol
Description:	Docket Report	Search Criteria:	5:21-cv-01108-SLP Start date: 1/1/1973 End date: 2/24/2022
Billable Pages:	3	Cost:	0.30