

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
22nd JUDICIAL CIRCUIT
DIVISION 3

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.,

Plaintiff

v.

EDWARD R. BENNETT,
CARL T. FISCHER, JR.,
KRIS KNIGHT, TOM FERREBEE,
SIMON FREDERICKS, M.D.,
and LYNN W. VIA,

Defendants

Case No. 09-CI-05292

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR STAY
PENDING APPEAL

Defendants Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferree, Simon Fredericks, M.D., and Lynn W. Via (collectively the "Members") submit this response to the Plaintiff American Saddlebred Horse Association's ("ASHA") motion to stay the Court's ruling pending appeal.

I. INTRODUCTION

In the Court's Opinion, Order and Judgment entered December 2, 2010 ("Opinion"), The Court granted the Members' motion for summary judgment and held "that the Defendants' Members set out above are entitled to inspect and copy any and all books and records of the ASHA and make copies thereof at a reasonable expense pursuant to their enumerated written request previously submitted." The Court's Final Judgment and Order dated January 6, 2011 ("Final Judgment") incorporates the Opinion by reference. The Final Judgment also states that

the Court “retains jurisdiction to enforce this Final Judgment and Order.” The ASHA appealed the Court’s ruling on February 3, 2011. Now, the ASHA is asking the Court to stay the Final Judgment because either (1) the Final Judgment does not require the ASHA to do anything or (2) the ASHA would suffer irreparable harm if required to comply with the law and the Court’s Final Judgment. Neither of the ASHA’s arguments have merit, and a stay is not appropriate.

II. ARGUMENT

The Final Judgment requires the ASHA to produce for inspection and copying certain corporate records and prohibits the ASHA from withholding responsive records. Accordingly, the ASHA must seek relief under CR 62.02 to obtain a stay pending the appeal – not CR 62.03 as the ASHA argues. CR 62.02 requires the ASHA to satisfy the heavy burden set forth in CR 65.08 to obtain a stay. As discussed below, the ASHA cannot meet that burden and is not entitled to a stay.

A. ASHA Must Seek Relief Pursuant To CR 62.02 To Obtain A Stay

CR 62.02 addresses the procedure to stay a judgment which requires or prohibits certain conduct (as is the case here). CR 62.03, on the other hand, addresses the procedure to stay a judgment awarding monetary damages or property such that the posting of a supersedeas bond is appropriate to protect the prevailing party’s interests. Here, the Final Judgment does not award monetary damages or property interest such that a supersedeas bond would be sufficient to protect the Members’ interests. Instead, the Final Judgment requires the ASHA to comply with the law and produce specific records sought by the Members. The Final Judgment also prohibits the ASHA from withholding responsive records. Accordingly, the Final Judgment falls squarely within the definition of injunctive relief as set forth in CR 65.01.¹

¹ CR 65.01 states that “[a]n injunction may restrict or mandatorily direct the doing of an act.”

ASHA's argument that the Final Judgment is a declaratory judgment and not binding on the ASHA is not correct. The ASHA and Members asked the Court to declare ASHA's responsibilities pursuant to KRS §273.233, and the Court did so in its written opinion. Of course, it is presumed that parties will abide by the law as declared by the court. That is why a "declaratory judgment is the functional equivalent of an injunction."²

The fact that the ASHA is seeking a stay proves that the Final Judgment requires the ASHA to comply with the Members' specific document requests. If, as the ASHA argues, the Final Judgment does not require the ASHA to act, there would be no need for the ASHA to request a stay of the judgment pending an appeal.

The Final Judgment requires ASHA to comply with requests for documents pursuant to KRS §273.233, and forbids the ASHA from withholding responsive records. It does not award monetary damages or property interests such that a supersedeas bond would protect the Members' rights. Accordingly, CR 62.02 applies to the ASHA's motion for a stay. CR 62.02 identifies CR 65.08 as the only procedure by which the ASHA may seek a stay of the judgment.³

B. ASHA Is Not Entitled To A Stay Pursuant To CR 65.08

To obtain a stay under 65.08, "the movant must demonstrate the following: (1) a probability of irreparable injury pending the appeal; (2) the equities weigh in favor of the requested relief; and (3) the appeal presents a substantial question on the merits or that the movant has a probability of success on appeal." 19 Sheryl G. Snyder *et al.*, *Kentucky Practice Appellate Practice* § 12:6(E) (2006) (emphasis added). This standard is analogous to the federal

² *Comm. on the Judiciary of the United States House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (quoting *Sanchez-Espinoza v. Reagan*, 248 U.S. App. D.C. 146, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985)).

³ *Bella Gardens Apartments, Ltd. V. Johnson*, 642 S.W.2d 898, 900 (Ky. 1982) ("[T]here is no room for doubt that CR 65.08 is the exclusive authority under which a stay may be had after a final judgment granting or denying injunctive relief has been appealed.").

rule, under which “federal courts have required the movant to make a strong showing of probable success on appeal.” *Id.* The ASHA cannot meet its burden under CR 65.08.

First, the ASHA has not established a probability that it will be injured irreparably unless the Final Judgment is stayed. The Final Judgment requires the ASHA to produce certain corporate records for inspection and copying by its members. The ASHA contends, without any supporting argument, that doing so would cause irreparable harm. The ASHA has not explained why it would be harmed at all, much less irreparably, by releasing those records for inspection by its members. It has not submitted a single sworn statement supporting its claim of irreparable injury. The Court reviewed the list of corporate records sought by the Members’, rejected ASHA’s claims of privacy and ruled that those records must be produced under the law.

Certainly, the ASHA cannot argue that it will be harmed as a result of the time and resources that would be required to produce the records for inspection. The ASHA has already spent much more time and money in an effort to prevent disclosure of the records. It is troublesome that the ASHA continues to spend corporate funds in further attempts to avoid producing records which indicate how the ASHA manages an approximately \$2,000,000 budget.

Second, the equities do not weigh in favor of allowing the ASHA to delay complying with the law any further. The ASHA is a non-profit entity subject to appropriate oversight by its members. Kentuckians have witnessed in recent months the importance of non-profit organizations being subjected to appropriate oversight.⁴ The Members asked to inspect certain categories of corporate records on April 20, 2009. Unfortunately, the ASHA has avoided its legal obligation to provide transparency to its members for almost two years. Granting a stay of the Final Judgment could allow the ASHA to avoid any oversight for yet another year. The

⁴ See the Lexington-Fayette Urban County Airport Board and, more recently, the Passport Health Plan.

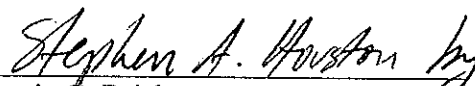
equities do not weigh in favor of allowing the ASHA another year of avoiding its members' oversight. Rather, the equities favor requiring the non-profit to allow its members to perform appropriate oversight as soon as possible.

The ASHA ignores the third and final factor that this Court must consider before staying the Final Judgment. That is because the third factor is the highest impediment to the ASHA obtaining a stay of the Final Judgment. ASHA simply cannot establish that it is likely to prevail on appeal. As the Court already recognized in its order granting summary judgment in favor of the Members, the language in KRS §273.233 is plain, and all of the cases discussing identical statutes support the Court's ruling.

III. CONCLUSION

The ASHA's motion for a stay of the Final Judgment pending appeal should be denied.

Respectfully submitted,


Lewis G. Paisley
Culver V. Halliday
Stephen A. Houston
STOLL KEENON OGDEN PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
Counsel for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Response to Plaintiff's Motion for Stay Pending Appeal was served via electronic mail and first class United States Mail, postage prepaid, to the following on the 17th day of February, 2011:

Edward H. Stopher
Jefferson K. Streepey
Jeff W. Adamson
Boehl Stopher & Graves, LLP
400 West Market Street, Suite 2300
Louisville, KY 40202-3354

And by First Class United States Mail to:

James B. Cooper
Boehl Stopher & Graves LLP
444 West Second Street
Lexington, Kentucky 40507-1009

Stephen A. Houston
Counsel for Defendants *By [Signature]*