

COURT OF APPEALS OF KENTUCKY
Case No. 2011-CA-000232

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

APPELLANT

v.

EDWARD BENNETT, ET AL.

APPELLEES

Appeal from Fayette Circuit Court
No. 09-CI-05292

MOTION FOR STAY PENDING APPEAL

MAY IT PLEASE THE COURT:

Appellant, American Saddlebred Horse Association, Inc. (“ASHA”), respectfully moves this Court for an Order to stay execution of or any proceedings to enforce the trial court’s final judgment of January 6, 2011, which incorporates in full the Opinion, Order and Judgment of December 2, 2010 (the “Final Judgment and Order”), pending final disposition of ASHA’s appeal. ASHA has good cause in bringing this Motion as follows:

I. INTRODUCTION

ASHA is a Kentucky nonprofit association consisting of over 7,000 individual members formed with the mission of promoting the breed of American Saddlebred horse. The Appellees consist of a small group of its large and diverse membership who made certain requests for inspection and copies of documents in the possession of ASHA. In response to the Appellees’ requests, ASHA made all documents falling under the enumerated categories of documents required to be maintained by a nonprofit corporation

under KRS §273.233 available for inspection, including all books and records of account of the association. The Appellees insisted, however, that a members' right to inspection is plenary and that they are, by dint of their status as members of a nonprofit association, entitled to access and copy each and every document in the possession of the non-profit organization. ASHA filed an action for declaratory relief in Fayette Circuit Court to request that the trial court declare the rights of the parties under KRS §273.233, which provides:

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors; and shall keep at its registered office or principle office in this state a record of the names and addresses of its members of its members entitled to vote. All books and records of a corporation may be inspected by any member, or his agent of attorney, for any proper purpose at any reasonable time.¹

The Appellees counterclaimed for declaratory relief under the same statute.²

After limited discovery, the parties filed cross motions for summary judgment. ASHA argued that under general rules of statutory construction the first and second sentences of the 2009 language of KRS §273.233 should be read together, with the first sentence enumerating what documents a nonprofit corporation must maintain for

¹ This was the language of the statute in 2009 when the dispute arose. KRS §273.233 was amended by the 2010 General Assembly to explicitly provide that the books and records inspected by a member may be copied by said member. The amendment in 2010 also expressly provides that the member's right of inspection shall not be abolished or limited by the corporation's articles of incorporation or bylaws.

² In their counterclaim, the Appellees also asserted claims for breach of contract (Count II) and promissory estoppel (Count III) seeking the same relief requested under their counterclaim for declaratory judgment (Count I). Appellees explicitly limited their dispositive motion to the declaratory judgment counterclaim, and never raised their counterclaims for breach of contract and promissory estoppel in their motion. These separate claims were dismissed without prejudice under the trial court's Final Judgment and Order entered January 6, 2011.

inspection by its membership, i.e., accounting and financial records, minutes of Board meetings, and the membership list, and the second sentence providing the membership with the right to inspect the documents so maintained. The trial court disagreed and held that the two sentences set forth separate and distinct rights, responsibilities and duties. By reading the second sentence separately, the trial court declared that the Appellees are entitled to inspect and copy every document in ASHA's possession. This appeal arises from the Fayette Circuit Court's January 6, 2011 Final Judgment and Order, which incorporated and made final the December 2, 2010 Order granting summary judgment in favor of Appellees.

ASHA appealed from the Final Judgment and Order on February 3, 2011. On or about the same date, ASHA's Executive Director was advised that a representative or representatives of the Appellees may appear at ASHA's corporate offices located at 4083 Iron Works Parkway, Lexington, KY 40511 to request that all documents be immediately produced for inspection and copying pursuant to the Final judgment and Order despite the appeal being taken. On February 7, 2011, ASHA moved the Fayette Circuit Court for a stay pending appeal. The Fayette Circuit Court denied ASHA's motion on February 28, 2011, but stayed enforcement of the Final Judgment for forty-five (45) days, or until April 4, 2011, unless a longer stay is granted by this Court pursuant to CR 65.08. Accordingly, ASHA moves this Court for an Order to stay execution of or any proceedings to enforce the trial court's Final Judgment and Order pending final disposition of ASHA's appeal.³

³ Pursuant to CR 65.08(4), ASHA attaches a copy of the Final Judgment and Order, ASHA's Notice of Appeal filed on February 3, 2011, and the Order from Fayette Circuit Court entered on February 28, 2011, as Exhibits 1, 2 and 3 to this Motion.

II. ARGUMENT

A. **The Final Judgment and Order Is Automatically Stayed Pending Appeal**

Appellees have taken the erroneous position that ASHA must move to stay the enforcement of this Court's Final Judgment and Order under CR 62.02 and 65.08 in order to prevent them from immediately executing on the judgment and obtaining access to any and all documents in ASHA's possession. However, CR 62.02 and 65.08 only apply to interlocutory relief pending an appeal from a final judgment granting or denying an injunction. This was an action for declaratory judgment. No injunctive relief was ever sought by the Appellees nor ordered in these proceedings by the Court such that ASHA must seek a suspension or modification of the Final Judgment and Order under these two rules.⁴ Any stay of the Fayette Circuit Court's Final Judgment and Order must therefore fall under CR 62.03, which applies to any request to stay proceedings pending an appeal taken from judgments other than injunction judgments.

Under CR 62.03, the enforcement of a judgment from which an appeal has been taken may be stayed "by giving a supersedeas bond." The purpose of such a bond is to secure the whole monetary amount of a judgment remaining unsatisfied or to secure property, as in actions involving the disposition of real property in controversy, pending an appeal.⁵ In this case, however, the Appellees have not sought monetary relief and none has been ordered. There is therefore no risk that monies needed to satisfy a judgment will be depleted or that property subject to the dispute will be sold prior to the disposition of ASHA's appeal. Rather the relief granted involves the public disclosure of

⁴ See ASHA's Complaint for Declaratory Judgment, attached hereto as Ex. 4, and Appellees' Answer to Complaint for Declaratory Judgment and Counterclaim – Request for Declaratory Judgment, ¶¶ 35-41 and Count I – Declaratory Judgment, ¶¶ 28-35, attached hereto as Ex. 5.

⁵ See Karam v. Greentree Corp., 783 S.W.2d 78, 81 (Ky. App. 1990).

records in ASHA's possession. These documents will be maintained and preserved by ASHA pending the outcome of the appeal. Thus, ASHA maintains that the Final Judgment and Order should be deemed automatically stayed.

B. In the Alternative, ASHA Is Entitled to a Stay during the Pendency of Its Appeal Under CR 65.08.

To the extent the Court deems the Final Judgment and Order, and the appeal taken therefrom, to be a final judgment denying an injunction, ASHA is entitled to interlocutory relief pending the appeal pursuant to CR 65.08. CR 65.08(2) permits a party denied interlocutory relief from a final judgment of the circuit court granting or denying an injunction to seek such relief from the Court of Appeals.⁶ Under CR 65.08, ASHA must demonstrate as follows:

- (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).

1. ASHA will suffer irreparable harm without a stay in the enforcement of the trial court's Final Judgment and Order pending final disposition of this appeal

ASHA will suffer irreparable harm without a stay in the enforcement of the trial court's Final Judgment and Order pending final disposition of this appeal. At issue in

⁶ When a circuit court has ruled on a motion for a temporary injunction, or has granted or denied an injunction in a final judgment, the aggrieved party may appeal the circuit court's decision pursuant to CR 65.07 and CR 65.08. Linden v. Cunningham, 2010 WL 5258474, *3 (Ky. Dec. 16, 2010), attached hereto as Ex. 6.

this litigation is and has always been the scope of a non-profit association member's right of inspection of documents under KRS §273.233. ASHA has spent significant time, money and other resources briefing and arguing this one legal issue to the trial court. The trial court considered all arguments and rendered its interpretation of KRS §273.233 as part of the Final Judgment and Order, declaring that the statute entitles members of a non-profit association to inspect and copy each and every document in the organization's possession and that copies must be made thereof at a reasonable expense. To permit execution from such a judgment despite the pending appeal would deny ASHA any possibility of relief on appeal. See Maupin v. Stansbury, 575 S.W.2d 695, 698 (Ky. 1978) ("clearest example of irreparable injury is where it appears that the final judgment would be rendered completely meaningless should the probable harm alleged occur prior to trial.").

Further, many of the documents requested by Appellees contain private and confidential information about officers, employees and members of the association, e.g., personnel files, salaries, and candid discussions about nominees for membership on the Board and its various committees. Such documents concern matters shared with an expectation of privacy and strict confidentiality. Appellees or their representatives have routinely posted documents relating to this case on internet blog sites for the entire world to see. If enforcement proceedings are not stayed in the Fayette Circuit Court pending the appeal, the Appellees or their representatives will most certainly do the same with each and every document produced pursuant to the Final Judgment and Order. Thus, a stay in the enforcement of the Final Judgment and Order is imperative to preserve any prospect for relief from disclosure of such confidential information pending ASHA's

appeal. If the Court were to do otherwise, ASHA would effectively be deprived of its constitutional right to one appeal.⁷

2. The equities weigh in favor of granting ASHA interlocutory relief pending its appeal

Likewise, the equities weigh in favor of granting ASHA interlocutory relief pending its appeal. Appellees will suffer no harm if a stay is granted. There has been no showing of fraud or mismanagement on the part of ASHA's Board members, officers, employees or membership in the trial court such that immediate enforcement of the Final Judgment and Order is necessary. Nor did the trial court issue such a finding in its declaratory judgment proceedings.

Further, there is no risk that the documents to be produced in compliance with the Final Judgment and Order will be lost or destroyed prior to the disposition of ASHA's appeal. A stay in enforcement of the Final Judgment and Order will only delay the production of documents and allow the parties to maintain the status quo until the appellate process runs its course. ASHA, on the other hand, stands to suffer irreparable harm without interlocutory relief pending the appeal. Enforcement of the trial court's order prior to reaching the merits on appeal renders the present appeal meaningless. Thus, the equities weigh heavily in favor of ASHA.

3. ASHA's appeal presents substantial questions on the merits and ASHA has a probability of success on appeal

Lastly, ASHA's appeal clearly presents a substantial question on the merits. This litigation is and has always been about a single declaratory judgment question: what is the scope of the right of inspection of documents afforded to members of a nonprofit

⁷ See Kentucky Constitution §115 ("In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court...").

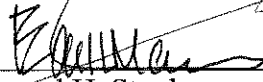
association under KRS §273.233. It is an issue of first impression for the Kentucky courts and the only issue on appeal. On appeal, ASHA will argue the trial court committed a number of errors in its ruling, including its conclusion that the limiting language of the first sentence did not apply to the second sentence of KRS §273.233; its failure to recognize the distinction between the inspection rights of a for-profit stockholder and the inspection rights of a member of a nonprofit association; its disregard for general versus specific language in the construction of statutes; its posing hypothetical alternative language for a statute to derive a conclusion as to the drafter's intent from the lack of such hypothetical language; and its failure to recognize the severe policy implications of imposing the burden of unfettered disclosure on non-profit associations. These issues are substantial questions on the merits, and ASHA has a probability of success on appeal.

III. CONCLUSION

WHEREFORE, Appellant, American Saddlebred Horse Association, Inc., respectfully moves this Court for an Order to stay execution of or any proceedings to enforce the trial court's final judgment of January 6, 2011, which incorporates in full the Opinion, Order and Judgment of December 2, 2010, pending final disposition of ASHA's appeal.

Respectfully submitted by:

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CERTIFICATE OF SERVICE

It is hereby certified this 17th day March, 2011 that a copy of the foregoing was served via First Class Mail, postage prepaid, to the following:

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