

NO. 09-CI-5292

FAYETTE CIRCUIT COURT
DIVISION 3
HONORABLE JAMES D. ISHMAEL

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

**AMERICAN SADDLEBRED HORSE ASSOCIATION'S MOTION
TO DISMISS COUNTS II AND III OF DEFENDANTS'
COUNTERCLAIM AS MOOT AND FOR ENTRY OF A FINAL
JUDGMENT AND AN APPEALABLE ORDER**

v.

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

DEFENDANTS

TO: Stephen A. Houston
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Louisville, Kentucky 40202-2828
Counsel for Defendants

NOTICE

PLEASE TAKE NOTICE that the undersigned will on Friday, December 17, 2010, at 8:30 a.m., local prevailing time, in the courtroom of the above Court, make the following Motion to dismiss Counts II and III of Defendants' Counterclaim as moot and for entry of a final judgment and appealable order.

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served via first class mail and electronically on this 10th day of December, 2010 to the persons and addresses listed above.

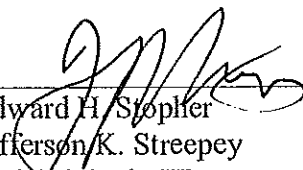
MOTION TO DISMISS COUNTS II AND III OF DEFENDANTS'
COUNTERCLAIM AS MOOT AND FOR ENTRY OF A FINAL JUDGMENT AND
APPEALABLE ORDER

Comes the Plaintiff, American Saddlebred Horse Association (hereinafter "ASHA"), by counsel, and hereby respectfully moves the Court for an Order dismissing Counts II and III of Defendants' Counterclaim as moot and for entry of a final judgment and an appealable order so that the parties may proceed with an appeal. As grounds for this Motion, ASHA states as follows:

This Court's Opinion, Order and Judgment of December 2, 2010, provides that the ASHA's Motion for Summary Judgment on ASHA's Complaint for Declaratory Judgment is overruled and that the Defendants' Motion for Summary Judgment on Count I of Defendants' Counterclaim for Declaratory Judgment is granted. In so doing, the Court orders that the Defendants are entitled to inspect and copy documents requested in the subject discovery requests pursuant to KRS 273.233. The Court further holds that the July 2009 Amendment to the ASHA Bylaws is invalid under the 2010 Amendment to KRS 273.233. ASHA desires to appeal the Court's interpretation and enforcement of KRS 273.233 but cannot do so because Counts II and III of Defendants' Counterclaim for breach of contract and promissory estoppel remain pending before the Court. Only a judgment which finally resolves a lower court action or which is properly made final under CR 54.02 can be appealed. CR 54.01; See also, Peters v. Board of Education of Hardin County, 378 S.W.2d 638, 639 (Ky. 1964). Counts II and III of Defendants' Counterclaim should be dismissed as moot because these counts seek precisely the same relief as sought in Defendants' declaratory judgment action, which has already been granted by this Court's December 2, 2010 ruling. Once Counts II and III are dismissed, the Court will have adjudicated all claims for all parties as required under CR 54.01 and the parties may proceed with a proper appeal.

ASHA relies upon the attached Memorandum of Law in further support of this Motion.

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NO. 09-CI-5292

FAYETTE CIRCUIT COURT
DIVISION 3
HONORABLE JAMES D. ISHMAEL

AMERICAN SADDLEBRED
HORSE ASSOCIATION, INC.

PLAINTIFF

**MEMORANDUM OF LAW IN FURTHER SUPPORT OF
AMERICAN SADDLEBRED HORSE ASSOCIATION'S MOTION
TO DISMISS COUNTS II AND III OF DEFENDANTS'
COUNTERCLAIM AS MOOT AND FOR ENTRY OF A FINAL
JUDGMENT AND AN APPEALABLE ORDER**

v.

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

DEFENDANTS

This Court's Opinion, Order and Judgment of December 2, 2010, provides that the American Saddlebred Horse Association, Inc.'s (hereinafter "ASHA") Motion for Summary Judgment on ASHA's Complaint for Declaratory Judgment is overruled and that the Defendants' Motion for Summary Judgment on Count I of Defendants' Counterclaim for Declaratory Judgment is granted. In so doing, the Court orders that the Defendants are entitled to inspect and copy documents requested in the subject discovery requests pursuant to KRS 273.233. The Court further holds that the July 2009 Amendment to the ASHA Bylaws is invalid under the 2010 Amendment to KRS 273.233. ASHA desires to appeal the Court's interpretation of KRS 273.233 but cannot do so until a final and appealable Order is entered. Accordingly, ASHA moves the Court to dismiss Counts II and III of Defendants' Counterclaim as moot and for entry of a final judgment and order that may be properly appealed.

Under CR 54.01 an order is final or appealable when it adjudicates all the rights of all the parties in an action or proceeding. An Order dismissing some, but not all, claims may still be final and appealable under CR 54.02 if the Order includes conclusions that the decision is “final” and “that there is no just reason for delay.”¹ This Court’s Opinion, Order and Judgment of December 2, 2010, is not final and appealable because Counts II and III of Defendants’ Counterclaim for breach of contract and promissory estoppel remain pending before the Court and the Judgment does not contain the requisite basis for appeal of the declaratory judgment action under CR 54.02.²

The Court can render a final judgment and an appealable order by dismissing Defendants remaining counterclaim. Counts II and III of Defendants’ Counterclaim, filed on October 27, 2009, should be dismissed as moot because Defendants seek precisely the same relief under these two Counts as was awarded under this Court’s December 2, 2010 Opinion, Order and Judgment. For instance, in Count II Defendants allege as follows:

37. ASHA offered to allow Counter-Plaintiffs to inspect or review “whatever they want.” Counter-Plaintiffs accepted ASHA’s offer. As a result, a contract existed between the parties for the inspection of whatever documents requested for inspection by the Counter-Plaintiffs.
38. ASHA breached the contract by refusing to allow the Counter-Plaintiffs to inspect the documents requested for

¹ Peters v. Board of Education of Hardin County, 378 S.W.2d 638, 639 (Ky. 1964); See also, Hook v. Hook, 563 S.W.2d 716, 717 (Ky. 1978) (This finality requirement is jurisdictional, and the appellate courts are obliged to dismiss appeals from judgments that they deem are not final, even if finality is not raised by the parties).

² The parties expressly deferred briefing on the breach of contract and promissory estoppel theories. For example, Defendants’ Motion for Summary Judgment, page 1, states in relevant part as follows:

Defendants Edward R. Bennett, Carl T. Fischer, Jr., Kris Knight, Tom Ferreebe, Simon Fredricks, M.D., and Lynn Via (collectively the “Members”), move the Court for summary judgment as to the Plaintiff’s Complaint and Count I of the Defendants’ Counterclaim, pursuant to Kentucky Rule of Civil Procedure 56.

inspection and that breach damaged the Counter-Plaintiffs.³

Likewise, Count III of Defendants' Counterclaim contains a promissory estoppel claim wherein Defendants assert as follows:

40. ASHA promised to allow the Counter-Plaintiffs to "inspect or review whatever they want." ASHA designated October 5, 2009 as the time for the Counter-Plaintiffs to inspect books and records of ASHA, and ASHA designated the Kentucky Horse Park, located in Lexington, Kentucky, as the venue for the inspection.
41. The Counter-Plaintiffs detrimentally relied upon the ASHA's promise.
42. ASHA failed to allow Counter-Plaintiffs to inspect or review documents as promised.
43. The Counter-Plaintiffs have been damaged as a result of ASHA's failure to fulfill the promise it made to the Counter-Plaintiffs. Counts II and III of Defendants' Counterclaim.⁴

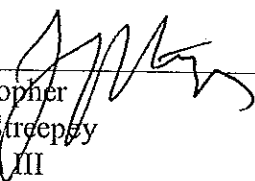
Counts II and III of Defendants' Counterclaim should therefore be dismissed as moot under the Court's December 2 Order so that the parties may proceed with the appeal of the Court's interpretation of KRS 273.233.

WHEREFORE, ASHA requests the Court enter a final judgment and an appealable order that dismisses all remaining claims as moot and provides the finality required for a proper appeal.

³ Emphasis added.

⁴ Emphasis added.

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