

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001370-I

BLACK DIAMOND PEST CONTROL,
INC., AND KEITH DUNCAN

MOVANTS

v. ON MOTION FOR RELIEF UNDER CR 65.07
 FROM FRANKLIN CIRCUIT COURT
 HONORABLE WILLIAM L. GRAHAM
 ACTION NO. 02-CI-01446

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF AGRICULTURE

RESPONDENT

OPINION AND ORDER

GRANTING CR 65.07 RELIEF

** ** *

BEFORE: GUIDUGLI, KNOPE AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Black Diamond Pest Control, Inc.,
(hereinafter "Black Diamond") and Keith Duncan (hereinafter
"Duncan") have moved this Court for interlocutory relief
pursuant to CR 65.07 from the Franklin Circuit Court's order
denying injunctive relief in the underlying pending action. A
three-judge panel previously granted Black Diamond and Duncan's
motion for emergency relief to preserve the status quo until
oral arguments could be heard, and ordered that no further

action be taken against Black Diamond or Duncan pending further order of this Court. Having considered the parties' pleadings, the oral arguments, and the applicable case law, we grant the motion for CR 65.07 interlocutory relief.

Black Diamond provides pest control services in both Kentucky and Indiana, and has been doing business in the Commonwealth for fifty years. In Kentucky, Black Diamond receives over \$1,000,000 in annual revenue and employs twenty-two people. Duncan serves as Black Diamond's president. Pursuant to KRS 217B.515, Black Diamond obtained, and held for thirteen years, a structural pest control license. KRS 217.535(5) requires that each applicator, or license holder of a structural pest control firm, must register annually and pay an annual \$100 fee. 302 KAR 31:025 §3(1) provides that the expiration date of each license is June 30 of each year.

In 2002, the Department of Agriculture did not send a license renewal application packet to Black Diamond as had been done in previous years. In June, Duncan contacted the Department to request his packet. A facsimile cover sheet from Debbie Armstrong of the Department of Agriculture reveals that the registration packet was faxed to Duncan on June 10, 2002. Upon receipt, Duncan claimed that he completed the registration form and mailed the form as well as a check for the \$100 annual fee to the Department of Agriculture. Black Diamond's checkbook

register reveals that check number 15666, dated June 14, 2002, was made payable to the Commonwealth of Kentucky and was in the amount of \$100. The Department apparently never received the registration form or the \$100 check.¹ On August 13, 2002, the Department sent Duncan a letter stating that his license had not been renewed by June 30, meaning that his license had lapsed and that he had to take and pass another licensing examination before a new license could be issued. Furthermore, the Department stated that the letter served as a cease and desist order, prohibiting Black Diamond from doing business in Kentucky until it had a valid license. Duncan had sent a letter to the Department the previous day, explaining the situation and enclosing another check for \$100. The Department responded by letter dated September 6, 2002, stating that Duncan had to retake and pass the licensing examination before he could obtain a new license and returning the \$100 check.

Black Diamond and Duncan filed a Verified Petition for Declaration of Rights and Complaint for Injunctive Relief with the Franklin Circuit Court on October 30, 2002, seeking a declaration that the regulations promulgated by the Department conflicted with KRS Chapter 217B and were therefore unenforceable. The trial court denied their motion for a temporary restraining order as well as their motion for

¹ Black Diamond's June 2002 bank statement reveals that check number 15666 had not cleared as of June 28, 2002.

reconsideration of the denial. Black Diamond and Duncan then sought a temporary injunction pursuant to CR 65.04 on April 23, 2003, arguing that the Department's regulations impermissibly expanded its authority beyond that contemplated by the statute and that the Department acted contrary to its prior administrative precedent without providing any reason. On June 18, 2003, the trial court entered an order denying the motion for a temporary injunction, essentially finding that Black Diamond and Duncan failed to show a substantial likelihood that they would prevail on the merits. This CR 65.07 motion for interlocutory relief followed.

CR 65.04(1) sets out the substantive elements required to establish a right to injunctive relief:

A temporary injunction may be granted during the pendency of an action on motion if it is clearly shown by verified complaint, affidavit, or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss, or damage pending a final judgment in the action, or the acts of the adverse party will tend to render such final judgment ineffectual.

In Maupin v. Stansbury, Ky.App., 575 S.W.2d 695 (1978), this Court set forth a three-prong test to determine whether a plaintiff is entitled to temporary injunctive relief. In order to establish entitlement to such relief, a plaintiff must show: 1) that he will suffer irreparable injury; 2) that the weight of

the equities involved is in his favor; and 3) that he has presented a substantial question in that the complaint raises a serious question requiring a trial on the merits. Because there is no real argument but that Black Diamond and Duncan have met the first two prongs and because the trial court did not address those prongs, we shall confine our discussion to whether Black Diamond and Duncan have met the third prong and have presented a substantial question in their complaint.

In the matter before us, the trial court concluded that Black Diamond and Duncan failed to present a substantial legal question as to why the license should not have been revoked. In the trial court below and before this Court, Black Diamond and Duncan have presented several arguments as to why they are entitled to prevail on the merits, including the constitutionality of the regulations, which they argue go beyond the scope of the Department's statutory authority because the regulations authorize a stricter penalty than the statute. Black Diamond and Duncan also argue that the Department deviated from its prior, more lenient policy without giving any reason for doing so and that the mailbox rule operated to protect them. We believe that Black Diamond and Duncan have at least presented a substantial question in their argument regarding the constitutionality of the regulations.

KRS 217B.535 requires every person to have a license prior to engaging in structural pest control in the Commonwealth. KRS 217B.535 requires each license holder to register annually and to pay a \$100 annual fee. The failure to register and to pay the annual fee is considered a violation of the statute pursuant to KRS 217B.550(4), for which violation the Department of Agriculture may suspend, revoke or modify the license. KRS 217B.545(1). However, the license holder is allowed ten days from receipt of the notification of the proposed suspension, revocation or modification to request a hearing. KRS 217B.545(2).

Pursuant to KRS 217B.050(1), the Department of Agriculture is to enforce the provisions of KRS Chapter 217B and has the authority to promulgate regulations to carry out the chapter's provisions. 302 KAR 31:025 §3 addresses license renewal, and provides that the failure to submit a renewal registration form and the \$100 fee by July 1 results in the lapse of the license. Before a new license may be issued, the license holder must take and pass a licensing examination. Additionally, 302 KAR 31:030 §2(1)(d) imposes an administrative fine of \$100 for the violation of KRS 217B.550(4), which addresses the failure to submit the registration form and pay the \$100 renewal fee.

In our view, Black Diamond and Duncan have presented a substantial question as to whether the regulations the Department promulgated to enforce the provisions of KRS Chapter 217B impermissibly expand its authority beyond that permitted by the statute. KRS 217B.990 provides only for a monetary fine for violations, and KRS 217B.545 provides that the Department "may" suspend, revoke or modify a license for the failure to submit the registration form and pay the annual renewal fee. However, the Department's own regulations take away the discretion afforded by the statute by requiring that a license lapse upon the failure to timely submit the registration form and renewal fee. Furthermore, there is no provision in the statute that would require a license holder to retake the licensing examination for the failure to timely submit the required form and renewal fee. Therefore, it appears that the Department's regulations go beyond the scope of the statute in providing much harsher penalties for license holders who fail to timely submit their renewal registration form and annual fee.

For the forgoing reasons, Black Diamond and Duncan's CR 65.07 motion for interlocutory relief is hereby GRANTED and the Franklin Circuit Court is DIRECTED to immediately enter a temporary injunction pursuant to CR 65.04 prohibiting the Department from taking further action against Black Diamond or

Duncan pending a final judgment. The trial court shall also set an appropriate bond in this matter.

ALL CONCUR.

ENTERED: August 1, 2003

/s/ Daniel T. Guidugli
JUDGE, COURT OF APPEALS

ORAL ARGUMENT FOR MOVANTS:

Robert A. Donald, III
Louisville, KY

ORAL ARGUMENT FOR RESPONDENT:

Mark Farrow
Frankfort, KY