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NOT TO BE PUBLISHED

**ORDERED NOT PUBLISHED BY SUPREME COURT:
APRIL 15, 2009
(FILE NO. 2008-SC-0824-D)**

**Commonwealth of Kentucky
Court of Appeals**

NO. 2007-CA-001526-MR
&
NO. 2007-CA-002055-MR

BLUEGRASS AUTOMOTIVE, INC.

APPELLANT

v. APPEALS FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 07-CI-00053

KENTUCKY UNEMPLOYMENT INSURANCE
COMMISSION; COMMONWEALTH OF KENTUCKY;
EDUCATION CABINET; DEPARTMENT FOR
WORKFORCE INVESTMENT; OFFICE OF
EMPLOYMENT AND TRAINING;
DIVISION OF UNEMPLOYMENT INSURANCE;
AND JAMES INMAN, IN HIS OFFICIAL CAPACITY
AS DIRECTOR OF THE DIVISION OF
UNEMPLOYMENT INSURANCE

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

DIXON, JUDGE: Bluegrass Automotive, Inc. (“Bluegrass”) appeals from two orders of the Franklin Circuit Court dismissing its complaint and dismissing its amended complaint against Appellees. We affirm.

In 2002, Bluegrass acquired the assets of Tom Payette Jaguar, Inc. In August 2006, Bluegrass contacted the Kentucky Unemployment Insurance Commission (“the Commission”) to inquire about a transfer of the unemployment insurance reserve account of Tom Payette Jaguar. Thereafter, on November 30, 2006, the Division of Unemployment Insurance (“the Division”) mailed a tax assessment notice to Bluegrass totaling \$36,326.92 for the Tom Payette Jaguar reserve account. The notice stated:

Appeal Information

If you disagree with this determination, you may file a written appeal to the Unemployment Insurance Commission pursuant to KRS 341.430(2). The appeals may be faxed, delivered to the Unemployment Insurance Commission or any office of the Division of Unemployment Insurance or mailed, if postmarked on or by 12/20/2006.

On January 8, 2007, Bluegrass appealed the assessment to the Commission. The following day, Bluegrass filed a complaint against the Commission in Franklin Circuit Court appealing the assessment and contending the Commission acted outside of its statutory power. On January 12, 2007, the

Commission filed a motion to dismiss the complaint, arguing the court did not have jurisdiction because Bluegrass failed to exhaust its administrative remedies pursuant to Kentucky Revised Statutes (KRS) 341.430 and KRS 341.450. The Commission contended that no final administrative order existed for the court to review, as the appeal of the assessment had been filed with the Commission on January 8. In response, Bluegrass argued it was not required to exhaust its administrative remedies pursuant to certain exceptions to the exhaustion doctrine.

On May 10, 2007, the court rendered an opinion and order granting the motion to dismiss. The court noted that it did not have subject matter jurisdiction because there was no final order of the Commission to review. The court also noted that the Division was the agency that issued the assessment, not the Commission; yet, the Division was not a party to the action.

On May 23, 2007, Bluegrass filed a motion to alter or amend the order of dismissal and requested leave to file an amended complaint. On June 12, 2007, while the motion was pending, Bluegrass filed an amended complaint, eliminating the Commission as a party. The amended complaint instead named the Division, the Commonwealth of Kentucky, the Education Cabinet, the Department for Workforce Investment, the Office of Employment and Training, and James Inman as Defendants. In the amended complaint, Bluegrass appealed the assessment, raised a due process issue and sought injunctive relief on the theory that the Division acted beyond the scope of its authority in issuing the assessment.

Thereafter, the Commission filed a motion to strike the amended complaint. In an order rendered June 26, 2007, the court denied the still-pending motion to alter or amend, granted the motion to strike and dismissed the amended complaint.¹

On July 10, 2007, Bluegrass filed a second motion to alter or amend, contending that the court erroneously dismissed its amended complaint. The trial court denied that motion on September 11, 2007.² This consolidated appeal followed.³

Bluegrass raises several arguments on appeal. Because we conclude the Franklin Circuit Court properly dismissed the complaint on jurisdictional grounds, we will not address Bluegrass's substantive claims.

In *Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1 (Ky. 1978), our Supreme Court stated:

There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy.

Id. at 2.

¹ 2007-CA-001526-MR

² 2007-CA-002055-MR

³ On November 14, 2007, this Court granted Bluegrass's motion to consolidate the appeals.

The statutes applicable in the case at bar, KRS 341.430(2), KRS 341.450 and KRS 341.460, clearly set forth the procedure for appealing an assessment. KRS 341.430(2) requires an employer to appeal to the Commission within twenty days after the assessment was mailed to the employer. Pursuant to KRS 341.450 and KRS 341.460, after the Commission renders a decision and all administrative remedies have been exhausted, an aggrieved employer may seek judicial review by filing a complaint against the Commission in Franklin Circuit Court within twenty days of the decision.

In the case at bar, it is evident that Bluegrass failed to follow the statutory mandate. Bluegrass filed its circuit court complaint against the Commission before the Commission had rendered a decision. Further, even if Bluegrass believed it was not required to exhaust its administrative remedies, the Division, rather than the Commission, would have been the proper party to name in the complaint because it rendered the assessment. Consequently, since Bluegrass disregarded the statutory requirements for appealing an agency decision, it failed to invoke the jurisdiction of the Franklin Circuit Court. *Flood*, 581 S.W.2d at 2. We conclude the court properly dismissed the complaint.

Despite our conclusion that the trial court did not have jurisdiction to entertain the cause of action, we must address Bluegrass's claim that the court erroneously dismissed the amended complaint. Bluegrass opines that its amended complaint was proper pursuant to CR 15.01, which allows a party to amend a pleading one time "as a matter of course . . . before a responsive pleading is

served.” Bluegrass contends that its amended complaint asserted viable claims against the Division and other Defendants.

Bluegrass erroneously relies on CR 15.01. “The civil rules which would normally permit amendment do not apply to appeals of administrative decisions until after the appeal has been perfected and jurisdiction has attached.” *Cabinet for Human Resources v. Holbrook*, 672 S.W.2d 672, 675 (Ky. App. 1984) (citing *Pollitt v. Ky. Unemployment Ins. Commission, et al.*, 635 S.W.2d 485, 487 (Ky. App. 1982)). Here, Bluegrass failed to perfect its appeal pursuant to KRS 341.450 and did not invoke the jurisdiction of the Franklin Circuit Court. Consequently, “the civil rules never became effective,” *Id.*, and Bluegrass’s amended complaint was properly dismissed.

For the reasons set forth herein, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

Tamela A. Biggs
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