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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001113-MR

TARGET OIL & GAS CORPORATION
AND MICHAEL SMITH

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 04-CI-00588

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF FINANCIAL INSTITUTIONS,
DIVISION OF SECURITIES

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: □ FORMTEXT □ □ CLAYTON, MOORE, AND TAYLOR □,
JUDGES.

TAYLOR, JUDGE: Target Oil & Gas Corporation and Michael Smith

(collectively referred to as Target) bring this appeal from a May 10, 2007, order of
the Franklin Circuit Court ordering Target to produce certain documents pursuant

to a *subpoena duces tecum* issued by the executive director of the Commonwealth of Kentucky, Office of Financial Institutions (executive director). We affirm.

On March 11, 2004, the executive director issued a *subpoena duces tecum* ordering Target to produce certain documents to the Office of Financial Institutions, Division of Securities. The executive director was investigating Target for possible acts of fraud and misrepresentation in the marketing of securities. See Kentucky Revised Statutes (KRS) 292.460; KRS 292.320. Target refused to comply with the *subpoena duces tecum*. As a result, the executive director instituted an action in the Franklin Circuit Court seeking enforcement of the *subpoena duces tecum* against Target. Eventually, the circuit court concluded that the *subpoena duces tecum* was valid and ordered Target to comply with its terms.

Target then pursued an appeal in the Court of Appeals. In Appeal No. 2004-CA-001947-MR, the Court of Appeals upheld the validity of the *subpoena duces tecum* and affirmed the circuit court's order mandating enforcement of same. Target then filed a motion for discretionary review with the Supreme Court. By order entered February 14, 2007, the Supreme Court denied Target's motion for discretionary review.

On February 26, 2007, the executive director filed a "Motion for Updated Subpoena" in the circuit court. Therein, the executive director argued that the circuit court's order of enforcement of the *subpoena duces tecum* "needs to be updated to cover the time between its entry and the present." In effect, the

executive director sought to compel Target to also produce documents covering a time period through “the present.”

Target filed a response and argued that it should not be compelled to produce the additional documents. Target maintained that the executive director was required to issue a new *subpoena duces tecum* in order to obtain documents from May 11, 2007, (when the original *subpoena duces tecum* was issued) to the present.

On May 10, 2007, the circuit court ordered Target to comply with the *subpoena duces tecum* issued by the executive director and specifically held “[i]n order to clarify the time periods covered by the documents in the attached list, the present shall be defined as the entry date of this Order.” Thus, Target was ordered to produce documents covering a time period though May 10, 2007. This appeal follows.

Target initially contends that the circuit court erred by “determining that an administrative *subpoena duces tecum* can be updated.” Specifically, Target argued:

[T]he original 2004 subpoena sought records from the inception of the company in 1999 to March 11, 2004, a period of five years. When Target Oil’s appeals were exhausted in 2007, the [executive director] filed a motion with the court requesting an “updated” subpoena seeking an additional three years of records. No new subpoena was issued or served. Neither the Motion, nor the Order, has a subpoena attached, only a list of items to be produced. The proper procedure would have been the issuance of a new subpoena served on the parties from whom production was sought. This did not occur. In a

novel procedural maneuver, the court simply amended the order from 2004 to increase the scope of the subpoena nearly two-fold.

This procedural innovation is not without significance. The violation of the procedural due process of the Appellants is undeniable. . . .

. . . .

The trial court allowed the [executive director] to increase its schedule of items to be produced and skip the required procedural steps. This action has at least two practical ramifications. First, if there's no new subpoena issued, there will be no new enforcement action. A new enforcement action would require the [executive director] to defend its subpoena process against new legal arguments rather than relying on the law of the case. Second, if there's no new subpoena, the [executive director] can return to the trial court, as often as it likes, and utilize the same process employed here to obtain endless access to [Target's] records without ever having to issue another subpoena or repel any legal argument.

Target's Brief at 4-5.

In this case, we do not believe the executive director was required to initiate a new enforcement action. The executive director merely sought documents covering the time period the case was on appeal until the case was remanded to the circuit court. The executive director did not seek "endless access" to records, and the circuit court did not order such access. Moreover, the delays in producing the documents under the *subpoena duces tecum* in this case are directly attributable to Target. It seems disingenuous for Target to now complain about producing additional documents covering a time period caused by its own delays.

Simply put, we are unable to conclude that Target’s due process rights were offended. Hence, we view this contention to be without merit.

Target also asserts that the “trial court erred in determining that the ‘undated’ *subpoena duces tecum* was within the scope of Chapter 292 of the Kentucky Revised Statutes.” In particular, Target argues:

The legislature clearly states that the purpose of Chapter 292 is the protection of Kentucky investors. The [executive director’s] investigative power was created by Chapter 292, specifically KRS 292.460. Since the purpose of the chapter is the protection of Kentucky investors, any subpoena issued by the [executive director] must be limited to documents and information related to Kentucky investors.

Target’s Reply Brief at 5. This argument is essentially the same argument raised previously by Target in Appeal No. 2004-CA-001947-MR and rejected by our Court:

Target insists, however, that the director’s anti-fraud authority is limited to fraud practiced against Kentucky investors. It asserts that it does not solicit or sell to Kentucky investors and thus that in this case even an anti-fraud inquiry is beyond the director’s authority. Clearly, though, the director is not obligated to accept Target’s denials at face value; and even if Target’s assertion is true, as noted above KRS 292.320 makes it unlawful for a Kentucky securities issuer to practice fraud “upon any person,” not just upon Kentucky residents. . . .

. . . .

The director’s investigative authority is not undermined, therefore, by Target’s assertion that it deals only with out-of-state investors.

We believe the decision by the Court of Appeals in Appeal No. 2004-CA-001942-MR on this issue constitutes the law of the case and may not be revisited in a subsequent appeal. *See Union Light Heat & Power Co. v. Blackwell's Adm'r*, 291 S.W.2d 539 (Ky. 1956). Notwithstanding, we observe that the decision in the earlier appeal appears to be correct based upon the facts and law applicable to this case.

In sum, we hold that the circuit court did not err by entry of its May 10, 2007, order enforcing the *subpoena duces tecum*.

For the foregoing reasons, the order of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jeffrey W. Jones
Lexington, Kentucky

BRIEF FOR APPELLEE:

William B. Owsley
Frankfort, Kentucky