

Commerce File Nos.  
MO2106226/DMG  
MO2107563/DMG  
MO2203630/DMG

15-1005-15202-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Mortgage Originator  
License of BlackDiamond Mortgage &  
Real Estate Consultants Corp. d/b/a  
ProTech Enterprise Investment Properties  
Trust, License No. 20225862

ORDER  
DENYING MOTION TO COMPEL  
DISCOVERY

On March 27, 2003, BlackDiamond Mortgage & Real Estate Consultants Corp. (BlackDiamond) filed a Motion to Compel Discovery. It asserted that the Department of Commerce (Department) had failed to answer Interrogatories and failed to produce documents that BlackDiamond had requested. It requested that the action commenced by the Department be dismissed because the Department had obstructed justice by failing to respond to the proffered discovery. BlackDiamond also requested attorneys fees for the expense of filing the motion. The Department filed its Memorandum in opposition to the motion on April 9, 2003.

Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared on behalf of the Department of Commerce. Berry Willis, Chief Executive Officer, BlackDiamond Mortgage & Real Estate Consultants Corporation, 4204 83<sup>rd</sup> Avenue North, Brooklyn Park, MN 55443, appeared on behalf of BlackDiamond Mortgage & Real Estate Consultants Corporation.

IT IS HEREBY ORDERED:

1. BlackDiamond's Motion to Compel Discovery and for sanctions, including dismissal of this action and attorneys fees, is DENIED.

2. The deadlines set forth in the Prehearing Order dated March 6, 2003 remain in effect. Discovery shall be completed by **May 5, 2003**. The Licensee has until that date to take the depositions of Commerce employees Dan Gallatin, Chris Lubin, Bonnie Polta and Robin Brown. In the event that the Licensee wants to depose James Bernstein, former Commissioner of Commerce, or any member of the Attorney General's staff, the Licensee must bring a motion to compel the deposition, setting forth the factual and legal basis for the discovery. The depositions of Department employees shall be conducted at the offices of the Department of Commerce, unless counsel for the Department agrees to an alternate location. The Department agrees that the

depositions may be videotaped. The Licensee bears the cost of the depositions of agency staff.

3. Any dispositive motions, including any motion to dismiss, shall be served and filed by **May 5, 2003**, and the responding party shall have ten working days to respond.

4. This matter is scheduled for hearing on **July 14, 2003**, commencing at **9:30 a.m.** at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401. The hearing will continue on July 15, 2003, if necessary.

5. The parties shall exchange proposed written exhibits and witness lists and file an index of exhibits and a copy of the witness list with this office by **July 7, 2003**. To the extent possible, the parties shall enter into prehearing stipulations regarding the facts involved in the hearing and foundation for anticipated exhibits. Any party objecting to foundation for any written exhibit must notify the offering party and judge in writing at least two working days prior to the hearing or the foundation objection is waived.

6. In the event that either side requests a court reporter, notice shall be given to the Office of Administrative Hearings no later than **July 7, 2003**.

7. Requests for subpoenas for the attendance of witnesses or the production of documents shall be made in writing to the administrative law judge pursuant to Minn. R. 1400.7000. A copy of the subpoena request shall be served on the other parties. A subpoena request form is available at [www.oah.state.mn.us](http://www.oah.state.mn.us).

8. The parties have not requested accommodation for a disability or appointment of an interpreter. The Office of Administrative Hearings shall be notified promptly, and no later than **July 7, 2003**, if either an accommodation or interpreter is needed.

9. In the event that the Licensee retains an attorney to represent it in this matter, this must be done promptly and the attorney shall promptly file a Notice of Appearance, and serve a copy on counsel for the Department.

Dated this 11<sup>th</sup> day of April 2003.

s/Beverly Jones Heydinger  
BEVERLY JONES HEYDINGER  
Administrative Law Judge

#### MEMORANDUM

In reviewing the motion brought by BlackDiamond, the administrative law judge has taken into account that Mr. Willis is not represented by counsel. The motion has

been considered under the provisions of Minn. R. 1400.6700 which govern discovery in contested cases, and the Rules of Civil Procedure. In order to prevail, BlackDiamond must show that it has tendered discovery requests, those requests were not fully answered, that the requested discovery “is needed for the proper presentation of the party’s case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery.” In ruling on the motion, the administrative law judge shall recognize all privileges recognized in law.<sup>[1]</sup>

BlackDiamond has failed to show that the Department withheld any of the requested documents, or that the Interrogatories were inadequately answered. As required by the Prehearing Order issued March 6, 2003, the Department turned over its files for the judge’s review. It included an index to the documents and notations about the documents provided to BlackDiamond. It is obvious that the Department has fully complied with the request for documents. There is no basis for concluding that any records were withheld. Furthermore, even if there were records withheld, the judge has the discretion to exclude such evidence from the hearing.<sup>[2]</sup> Thus, the Department will not be able to use documents or witnesses whose statements are not disclosed.

The Department responded to some of the Interrogatories and directed BlackDiamond to its documents for the answers to the others. This is consistent with Minn. R. Civ. P. 33.03. It states:

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records...and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies,...

In this case, the Department has provided copies of its records. They are divided into understandable files, and they are not so great in number as to place an unreasonable burden on BlackDiamond to review and locate the documents that it has requested and to locate the answers to the questions posed by its Interrogatories. The files fill less than one carton.

With a few minor exceptions, the logs show that all the documents have been provided to BlackDiamond.

#### Privileged Documents.

There are two documents protected from disclosure by the attorney/client privilege.<sup>[3]</sup> Each one is directly tied to this litigation. The Department is not required to turn over these documents to BlackDiamond.

Copy of Chapter 13 and Licensing Packet.

The file includes a copy of Minn. Stat. ch. 13 (Bates Nos. 010170-010235). According to the index, it was not copied for BlackDiamond. Since the statute is readily available, and is not a document collected in the conduct of the investigation, the Department was not required to provide a copy to BlackDiamond. The Licensing Packet (Bates Nos. 010158-010169) contains generic information and application forms. These are blank and have no direct relationship to the investigation. It is unclear whether BlackDiamond received a copy of the packet. Accordingly, the Department should supply a copy.

File MO2106226.

Copies of this file were provided to BlackDiamond, except for four pages of a fax originally sent to the Department by BlackDiamond. This omission is *de minimis*.

Miscellaneous Faxes to BlackDiamond.

The index lists some documents that could not be located by the assigned Bates numbers, although from the names, it appears that they may be duplicates of other numbers:

- 010289 – Facsimile cover sheet dated December 10, 2002 (same as 0001?)
- 010290-010340 – Dpt. Of Commerce Policy and Procedures Manual (Investigation specific portions)
- 010236 – Facsimile cover sheet dated December 17, 2002 (same as 9865?)
- 010237-010288 – Dpt. Of Commerce Policy and Procedures Manual (Investigation specific portions)

The Department should verify that these are duplicates and, if not, supply BlackDiamond with the documents. The files show that a full copy of the Department's manual was supplied.

Bates No. 010349.

This document, "Telephone Message for Mary Lippert" was listed for File No. M02203630 but could not be located in the file. The Department should examine the file to determine if the document has been misfiled.

Request for Production of Documents Number 35 asks for "state laws, statute (sic) and procedure" used in part of the Department's investigation. The Department is not obligated to supply copies of statutes it used to develop its investigation or that it may use to support its action as part of discovery. It has provided BlackDiamond with its procedures.

Some of the Interrogatories posed by BlackDiamond are unclear. (See, e.g., Interrogatories 9, 12 and 13.) The balance appear to be fully addressed by the document production.

BlackDiamond should turn its attention to reviewing the materials it has received, and completing any depositions that it intends to conduct prior to the May 5, 2003 deadline. It has failed to show that the Department has interfered with its ability to prepare to defend this contested case action.

Accordingly, its motion is denied, and no award of attorneys fees will be considered.

B.J.H.

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<sup>[1]</sup> Minn. R. 1400.6700, subp. 2.

<sup>[2]</sup> Minn. R. 1400.6700, subp. 1 D.

<sup>[3]</sup> See Minn. Stat. §§ 481.06, 595.02, subd. 1 (b).