

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-001926-MR

CAB-VERTISING OF LOUISVILLE, INC.

APPELLANT

V. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
ACTION NO. 95-CI-2305

LOUISVILLE/JEFFERSON COUNTY OFFICE
FOR ECONOMIC DEVELOPMENT

APPELLEE

OPINION AND ORDER
DISMISSING

* * * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON¹ and COMBS, Judges.

COMBS, JUDGE: The appellant, Cab-Vertising of Louisville, Inc., appeals from the judgment of the Jefferson Circuit Court which granted summary judgment in favor of the appellee, Louisville/Jefferson County Office For Economic Development (OED). For failure of the appellant to name all indispensable parties, we order this appeal dismissed.

¹Judge Abramson concurred in this opinion and order prior to leaving the Court on November 22, 1998.

In March, 1991, Cab-Vertising received a \$30,000 business loan through the Minority Business Development Loan Program (the loan program) which provides minority businesses with short-term financing. Created by an agreement between and among the OED, Jefferson County, and a consortium of area banks, the loan program is administered by OED.

After Cab-Vertising signed a promissory note and a guaranty agreement, OED made the first disbursement of the loan to Cab-Vertising; the remaining balance of the loan was to be disbursed directly to the manufacturer developing the prototypes for Cab-Vertising in two installments to be paid as specified stages of the project were completed. However, between June and October 1991, Cab-Vertising failed to make its monthly payments; as a result, OED refused to release the remaining balance of the loan. Ultimately, the Executive Committee of the loan program declared Cab-Vertising's loan to be in default, and OED filed a collection action against Cab-Vertising and the seven guarantors of the loan. The case was eventually settled and, on April 26, 1998, it was dismissed by order of the Jefferson Circuit Court for lack of prosecution.

On April 26, 1995, Cab-Vertising filed a complaint against the OED, the City of Louisville, and Jefferson County seeking damages for breach of contract, malicious institution of legal proceedings, negligence, and outrageous conduct. Its complaint was based upon the alleged actions of the defendants regarding the business loan that Cab-Vertising had received in March 1991. On March 15, 1996, the court granted summary

judgment in favor of the defendants as to Cab-Vertising's claims of negligence, malicious institution of legal proceedings, and outrageous conduct; only Cab-Vertising's claim for breach of contract remained. Shortly thereafter, on June 7, 1996, the court again granted summary judgment in favor of the defendants, this time dismissing Cab-Vertising's remaining claim for breach of contract. On July 6, 1996, Cab-Vertising filed a notice of appeal from the Jefferson Circuit Court's order of June 7, 1996. The notice, however, named only OED as an appellee, omitting the City of Louisville and Jefferson County as parties to the appeal. This omission raises the procedural issue of whether Cab-Vertising failed to name all of the indispensable parties to this appeal.

The notice of appeal transfers jurisdiction of a case from the circuit court to the appellate court. Clark Equipment Company, Inc. v. Bowman, Ky. App., 762 S.W.2d 417(1988). It places only the named parties within the jurisdiction of this Court. City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). Failure to name all necessary parties to an appeal is a fatal flaw. R.L.W. v. Cabinet For Human Resources, Ky. App., 756 S.W.2d 148 (1988). Where absence of a party prevents this Court from granting complete relief among those already named as parties, we are precluded entirely from entertaining the merits of an appeal. Braden v. Republic-Vanguard Life Insurance Company, Ky., 657 S.W.2d 241 (1983), construing CR 73.03.

The OED was created pursuant to a Cooperative Compact executed by the City of Louisville (the City) and Jefferson

County (the County). The City and the County agreed to create "a joint City/County Department for the purpose of promoting economic development to be known as the Louisville and Jefferson County Office for Economic Development." Cooperative Compact, Section XVIII (A). In accordance with the compact, OED was to be financed by annual appropriations from both the City and the County based upon a proposed budget prepared by the Mayor and the County Judge-Executive. The director of OED was to be appointed jointly by the Mayor of the City and the County Judge-Executive, and OED employees were to be classified and compensated at the same rate as employees for the City. All power of OED (including its finances and personnel) is derived from the County and the City. Indeed, the OED even lacks the authority to pay its own expenses as the compact designated the City as the OED's fiscal agent responsible for paying its expenses.

'Accurately, suits by or against a municipal corporation should be in its corporate name and not by or against the individuals composing it, or the council, or its officers, or its corporate authorities.'

Buckner v. Clay, Ky., 206 S.W.2d 827, 829 (1947), quoting McQuillin, Municipal Corporations, Volume 6, paragraph 2657.

OED functions only as an agent for the City and County and is not an independent legal entity capable of suing or being sued on its own. Any judgment returned against the OED would be paid by the City and the County -- both of which prepare and fund the OED's budget. Any suit brought against OED would, therefore, have to name the city and the county as parties.

As Cab-Vertising has failed to name all of the necessary parties to this appeal, we are precluded from addressing the merits of this appeal. Therefore, we hereby ORDER the appeal dismissed.

ABRAMSON, JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, CONCURS IN RESULT.

Date: November 25, 1998

/s/ Sara Combs
JUDGE, KENTUCKY COURT OF APPEALS

BRIEF FOR APPELLANT:

Wendell L. Jones
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BRIEF FOR APPELLEE:

Edwin J. Lowry, Jr.
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