

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002848-MR

DEPOSIT BANK OF MONROE COUNTY

APPELLANT

v. APPEAL FROM MONROE CIRCUIT COURT  
HONORABLE PAUL JONES, JUDGE  
ACTION NO. 97-CI-00022

JAMES L. POLAND; VIRGINIA C. POLAND;  
AMERICAN GENERAL HOME EQUITY, INC.  
AND EDDIE PROFFITT (D/B/A PROFFITT  
REAL ESTATE AGENCY)

APPELLEES

and

NO. 1997-CA-002939-MR

JAMES L. POLAND

CROSS-APPELLANT

v. CROSS APPEAL FROM MONROE CIRCUIT COURT  
HON. PAUL JONES, JUDGE  
CIVIL ACTION NO. 97-CI-00022

DEPOSIT BANK OF MONROE COUNTY

CROSS-APPELLEE

### OPINION AND ORDER

### DISMISSING

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BEFORE: GUDGEL, CHIEF JUDGE; BARBER, AND McANULTY, JUDGES.

BARBER, JUDGE: On June 19, 1997, Appellant, the Deposit Bank of Monroe County, ("the Bank") filed a Complaint against the Appellees, James L. Poland and Virginia C. Poland, ("Polands") in the Monroe Circuit Court. The Bank alleged that the Polands were in default on a note secured by a real estate mortgage. The Bank sought judgment in the amount of \$49,686.12 and judicial sale of the real property to satisfy the debt.

An Agreed Judgment and Order of Sale was entered August 5, 1997. The parties agreed that the real estate would be sold at absolute auction sale, with reserve. Judgment was granted for the Plaintiff Bank against the Polands in the amount of \$51,135.05, as of July 30, 1997 together with accrued interest thereon from July 30, 1997..." and awarding the Plaintiff Bank "its reasonable attorney's fees as incurred and allowable by law, and court costs." The Agreed Judgment and order of sale further provided that the Bank would have a first lien on the real property to secure the payment of "said judgment including reasonable attorney's fees, as permitted by KRS 411.195..."

KRS 411.195 is entitled, "Enforceability of written agreement to pay attorney fees in event of default." The statute provides:

Any provisions in a writing which create a debt, or create a lien on real property, requiring the debtor, obligor, lienor or mortgagor to pay reasonable attorney fees incurred by the creditor, obligee or lienholder in the event of default, shall be enforceable, provided, however, such fees shall only be allowed to the extent actually paid or agreed to be paid, and shall not be allowed to a salaried employee of such creditor, obligor or lienholder.

On September 18, 1997, the Bank filed a motion to disburse the funds (sale proceeds) held by Proffitt Real Estate Agency to the "Deposit Bank of Monroe County as of 9/24/97 the sum of \$59,894.15, which consists of the Judgment amount, interest, court costs and attorney's fees."

On September 26, 1997, the Bank's counsel, Hon. Reed N. Moore, filed an affidavit that he had received a check drawn on Proffitt Real Estate Agency's escrow account of \$51,860.25; that the net to the Bank, after deduction of attorney's fees was \$44,081.21. Attached to the Affidavit were copies of that check and of two checks drawn on Mr. Moore's escrow account - one in the amount of \$44,081.21 payable to the order of the Deposit Bank of Monroe County and the other in the amount of \$7,779.04 payable to the order of Reed N. Moore, Jr.

The Affidavit of counsel stated that, "As is obvious, the attorney's fee has been incurred pursuant to the contingency fee agreement. It is the same contingency fee agreement between Reed N. Moore, Jr. and the Deposit Bank of Monroe County that has been in effect since 1991." No written contingency fee agreement was filed. The Bank filed a document entitled, "Partial Settlement," signed by its president, Charlie Kirkpatrick, reflecting "additional income and expenses in the above-styled action," consisting of a payoff of principal and interest in the amount of \$51,860.25, and a 15% attorney fee in the amount of \$7,779.04.

On October 7, 1997, James L. Poland, filed a motion requesting that the circuit court strike the affidavit/partial

settlement contending that he did not have an opportunity to cross-examine the affidavits; that they contained hearsay; that he was entitled to an opportunity to offer contrary proof; and that an affidavit containing an itemization of time expended should be required from the Bank's attorney to support a reasonable attorney fee based upon an hourly rate. Poland also requested that he be granted 60 days discovery and that an evidentiary hearing be scheduled.

By Order entered on October 8, 1997, the Monroe Circuit Court ordered that "the Debtor shall pay the Plaintiff's attorney, Reed N. Moore, Jr., \$3,106.00 as a reasonable attorney's fee to be paid by the Debtor."

On November 7, 1997, the Bank filed a Notice of Appeal "from the final judgment entered by the circuit court in this matter on October 8, 1997." The Bank's Notice of Appeal does not name attorney, Reed N. Moore, Jr., as a party.

On November 14, 1997, James L. Poland filed a Notice of Cross-Appeal from the "order entered by the Monroe Circuit Court on October 8, 1997." Poland's Notice of Cross-Appeal does not name the attorney, Reed N. Moore, Jr., as a party.

On appeal, the Bank argues that "attorney's fees are enforceable as actually incurred as long as they are not determined to be unreasonable." The Bank seeks an increased fee pursuant to "the contingency fee contract" and "the Affidavits of the two bank presidents of the three banks in the County."

The Bank provides no citation to the record, as required by CR 76.12(4)(c)(iii). The Bank refers to the statute,

KRS 411.195, as the "Law," but fails, as required under CR 76.12(4)(c)(iv), to support its argument with any legal authority that the circuit court erred in determining the amount of a reasonable attorney fee. The Bank refers to and includes, as exhibits to its brief, two affidavits which do not appear to be in the record on appeal.

Additionally, the appeal is fatally defective, as is the cross-appeal, because the attorney was not named as a party to the appeal. Here, the judgment appealed and cross-appealed from states, in pertinent part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Debtor shall pay the Plaintiff's attorney, Reed N. Moore, J., \$3,106.00 as a reasonable attorney's fee to be paid by the Debtor. This is a final and appealable order.

The award of attorney fees was made directly to the attorney. Under this circumstance, the attorney is a necessary party to an appeal contesting the award. Knott v. Crown Colony Farm, Inc., Ky. 865 S.W.2d 326, 331 (1993). Accordingly, both the appeal and cross appeal be and hereby are dismissed for failure to name the Plaintiff's attorney as a necessary party.

ALL CONCUR.

David A. Barber  
JUDGE, COURT OF APPEALS

ENTERED: March 10, 2000

BRIEF FOR APPELLANT/CROSS  
APPELLEE:

Hon. Reed N. Moore, Jr.  
Tompkinsville, Kentucky

BRIEF FOR APPELLEES/CROSS  
APPELLANTS:

Hon. Joe Lane Travis  
Glasgow, Kentucky

