

RENDERED: SEPTEMBER 1, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001725-MR

K & G BEAR CREEK RETREAT, LLC;
MONTGOMERY WILDERNESS
COMPANY, LLC; KENT MONTGOMERY;
AND GAYLENE MONTGOMERY

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 14-CI-00143

KENTUCKY FARMERS BANK

APPELLEE

OPINION AND ORDER
DISMISSING

** ** * * * * *

BEFORE: JONES, D. LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: K & G Bear Creek Retreat, LLC, Montgomery Wilderness
Company, LLC, Kent Montgomery, and Gaylene Montgomery (collectively
referred to as appellants) bring this appeal from an October 20, 2015, summary

judgment and order of judicial sale of the Boyd Circuit Court. We dismiss the appeal for failure to name an indispensable party.

In February of 2014, Kentucky Farmers Bank filed a foreclosure action in the Boyd Circuit Court against appellants. Therein, Farmers Bank alleged that appellants had defaulted upon promissory notes and personal guarantees in the principal sum of approximately 2.35 million dollars and that it held mortgages as security upon certain real property located in Boyd County. Appellants answered and also filed a counterclaim against Farmers Bank and a third-party complaint against Prichard Realty.¹ Prichard had appraised the real property for appellants' loans with Farmers Bank. Appellants alleged that Farmers Bank and Prichard improperly colluded to inflate the appraised value of the real property upon which appellants relied. In particular, appellants specifically raised in their counterclaim and third-party complaint the following claims against Farmers Bank and Prichard: fraudulent appraisal, fraudulent misrepresentation, unconscionable contract, and joint venture. Appellants also alleged that Farmers Bank failed to provide a settlement of account and violated Kentucky Revised Statutes 355.4-401 of the Kentucky Uniform Commercial Code.

By interlocutory order entered April 24, 2015, the circuit court dismissed appellants' counterclaim against Farmers Bank and third-party complaint against Prichard. Then, by summary judgment and order of judicial sale

¹ The counterclaim and third-party complaint alleged that Kentucky Farmers Bank made two loans to appellants in 2012 and 2013 totaling \$2,350,000.

entered on October 20, 2015, the circuit court concluded that appellants defaulted under the terms of the promissory notes and ordered the real property sold by the master commissioner. The court also held that “[t]his is a final and appealable Judgment, the Court finding no just cause for delay; pursuant to [Kentucky Rules of Civil Procedure] CR 54.02(2) all prior Orders of this Court are incorporated herein[.]” Thus, the order entered on April 24, 2015, dismissing the counterclaim and third-party complaint became final on October 20, 2015.

On November 9, 2015, appellants filed a notice of appeal from the October 20, 2015, order. Specifically, appellants stated they have “appeal[ed] to the Kentucky Court of Appeals so much of the order entered on October 20, 2015[,] in favor of the Appellee below (See Order attached hereto as Exhibit 1) that dismisses their counterclaims and third-party complaint.” In the notice, appellants only named Farmers Bank as appellee, and did not reference Prichard, notwithstanding, that the notice clearly stated they were appealing the judgment dismissing their third-party complaint against Prichard.

On February 1, 2016, Farmers Bank filed a motion to dismiss the appeal for the failure of appellants to name an indispensable party. Appellee argued that appellants failed to name Prichard as an appellee and that Prichard was an indispensable party to this appeal. Appellants filed a response and asserted that Prichard was not an indispensable party and argued this Court should deny the motion to dismiss. By order entered April 22, 2016, a motion panel of the Court of

Appeals passed Farmers Bank's motion to dismiss to this merits panel for consideration.

In Kentucky jurisprudence, it is well-established that failure to name an indispensable party in the notice of appeal is considered a judicial defect that results in dismissal of the appeal. *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990). A party is viewed as indispensable if such party's interest would be affected by a decision of the Court. *Browning v. Preece*, 392 S.W.3d 388 (Ky. 2013). And, our Supreme Court has held that "[t]he necessity of joining parties whose interest may be effected is not eliminated simply because the effect upon that interest may be minimal, or even beneficial to them." *Browning*, 392 S.W.3d at 392.

Upon thorough review of the record below, we conclude that Prichard is an indispensable party to this appeal. It is clear that Prichard's interest would be affected by a decision of this Court. The claims against Farmers Bank and Prichard are intertwined throughout the counterclaim and third-party complaint. Appellants have alleged that Farmers Bank and Prichard colluded to perpetrate fraud and other torts upon appellants by improperly inflating the value of the real property in the appraisal submitted to Farmers Bank by Prichard. It is further alleged that the fraudulent appraisal influenced the appellants in obtaining the loans. In their seven-page brief to this Court, appellants reference Prichard and its appraisal more than a dozen times. It thus would be incumbent upon this Court to determine whether sufficient disputed facts existed to support allegations that

Prichard did improperly inflate its valuation of the real property in the appraisal. In so doing, Prichard's "interest" would certainly be affected thereby. *See Browning*, 392 S.W.3d 388. We, thus, are of the opinion that Prichard is an indispensable party to the above-styled appeal. Reluctantly, we are duty bound to dismiss this appeal.

Now, therefore be it ORDERED that Appeal No. 2015-CA-001725-MR is hereby DISMISSED for failure to name an indispensable party.

ALL CONCUR.

ENTERED: September 1, 2017

/s/ Jeff S. Taylor
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

Kenneth J. Henry
Louisville, Kentucky

BRIEF FOR APPELLEE:

Ernest M. Pitt, Jr.
Ashland, Kentucky