

ORDER OF COURT

NOW, this 19th day of January, 1982, the defendant's motion to strike for failure to join Everett Cash Mutual Insurance Company as a necessary party is granted; the defendant's motion to strike the plaintiff's prayers for the award of damages and interest is granted; all other preliminary objections are dismissed. The plaintiff is granted twenty (20) days from date of this Order to file an amended complaint pursuant to the above Opinion.

Exceptions are granted the parties.

PECK AND JONES v. FIRST NATIONAL BANK OF
McCONNELLSBURG, C.P. Franklin County Branch, No. 103
of 1981-C

Confession of Judgment - Execution - Residential real property - Attorney Fees

1. Section 407 of the Act of 1974, January 30, P.L. 13, No. 6, 41 P.S. Sec. 407 restricts the right of a plaintiff to levy or execute on residential real property of a debtor solely on the basis of a confessed judgment.
2. Section 407 requires a plaintiff to file an appropriate action and proceed to judgment against the defendant as in any original action.
3. Where judgment was entered on a note containing a confession of judgment clause and a complaint in Confession of Judgment was thereafter filed, a writ of execution and levy on the debtor's real estate was untimely and improper.
4. Attorney's fees can only be taxed when shown to have been actually charged.

James M. Schall, Esq., Legal Services, Inc.

OPINION AND ORDER

EPPINGER, P.J., January 18, 1982:

In 1979 John L. Peck and Anna M. Jones (Peck and Jones) signed a \$15,000 note in favor of The First National Bank of

FIRST NATIONAL

bank and trust co.

13 West Main St.
WAYNESBORO, PA. 17268
717-762-3161



TRUST SERVICES
COMPETENT AND COMPLETE

CITIZENS *National Bank*
OF **AND TRUST COMPANY**

WAYNESBORO, PENNSYLVANIA
17268

Telephone (717) 762-3121

THREE CONVENIENT LOCATIONS
POTOMAC SHOPPING CENTER — CENTER SQUARE
WAYNESBORO MALL

McConnellsburg (Bank). The note contained a confession of judgment clause and the Bank entered judgment on the note the same day it was executed, creating a lien on the property of Peck and Jones.

After Peck and Jones defaulted, the Bank filed a Complaint in Confession of Judgment on April 7, 1981, issued execution on May 12, 1981 and directed the Fulton County Sheriff to levy on their real property. On June 5, 1981 Peck and Jones Petitioned to Set Aside the Levy or Stay the Execution. We issued a temporary stay and a rule to show cause why the execution should not be set aside. The Bank answered and we heard argument.

We agree with Peck and Jones that the Bank's filing a Complaint in Confession of Judgment and then executing was improper. Section 407 of the Act of 1974, Jan. 30, P.L. 13, No. 6, 41 P.S. Sec. 407 restricts the right of a plaintiff to levy or execute on residential real property of a debtor solely on the basis of a confessed judgment. The plaintiff must file an appropriate action and proceed to judgment and decree against defendant as in any original action. Pa. R.C.P. 2981-2986 indicate that plaintiff must proceed conforming to an action in assumpsit.

Because the statutory procedure was not followed, the writ of execution and levy upon the real estate of Peck and Jones was untimely and improper. Under Sec. 407 (a) of the Act of 1974, supra, when a judgment has been obtained in conformance with actions in assumpsit, the new judgment merges with the confessed judgment, the confessed judgment is then conformed as to amount to the new judgment, and plaintiff may execute on the confessed judgment. This procedure not having been followed, the stay of execution will be continued pending final outcome of the matter.¹

Peck and Jones have requested attorney's fees. We dismiss the claim. The statute entitles any debtor who prevails in any action to enforce a judgment entered by confession to recover

¹ June 1, 1981 the Bank filed a Complaint required by Sec. 407 of the Act of 1974, supra. Peck and Jones filed an Answer Containing New Matter and Counter Claim and the Bank filed a Reply to New Matter. It appears the Bank is now proceeding in the appropriate way. Depending on the outcome, execution against the property of Peck and Jones may be proper.

reasonable attorney's fees and costs as determined by the court. The general rule is that attorney's fees can only be taxed when shown to have been actually charged to or paid by the party seeking to recover them. 20 Am Jur 2d Costs pgs. 58, 59, Sec. 72. Here no fees were shown to have been charged to or paid by Peck and Jones because they are represented without charge by Legal Services, Inc. Nor was there any evidence offered regarding such attorney's fees.

The statutory authority to award attorney's fees is valuable in deterring abuses, but we do not believe this situation is one in which attorney's fees should be awarded for punitive reasons. The Bank's actions, though erroneous, were not taken in bad faith, no substantial harm was done and the case is now proceeding properly.

ORDER OF COURT

January 18, 1982, IT IS ORDERED that Temporary Stay of Execution is continued until the outcome of the Bank's current action apparently conforming to law is established. The request of Peck and Jones for an award of attorney's fees is denied. Costs incidental to this part of the proceeding shall be paid by the Bank. All other costs shall abide the event.

LUTMAN v. GSELL, C.P. Franklin County Branch, A.D. 1981 - 232

Assumpsit - Brokerage Contract - Right to Commission - Preliminary Objection.

1. A broker's right to commission generally accrues as soon as he presents a purchaser ready, willing and able to purchase the property upon the agreed terms.
2. Upon the procurement of a ready, willing and able buyer, sale is treated as constructively consummated.
3. The parties to a brokerage contract may specify in the contract at what point in a real estate transaction the broker earns his commission.