IN THE COURT OF APPEALS

FIRST AMERICAN NATIONAL BANK,	)	WASHINGTON CHANCERY
	)	C.A. NO. 03A01-9507-CH-00244
	)	
Plaintiff-Appellant	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. G. RICHARD JOHNSON
	)	CHANCELLOR
	)	
	)	
	)	
	)	
	)	
JAMES W. ROBINSON,	)	AFFIRMED AND REMANDED
	)	
Defendant-Appellee	)	

RICK J. BEARFIELD, Johnson City, for Appellant.

JAMES W. ROBINSON, Pro Se.

OPINION

McMurray, J.

This is an appeal from the judgment of the trial court disallowing attorney's fees in an amount to which the appellant,

First American Bank, insists it is entitled. We affirm the judgment of the trial court.

First American filed its complaint against the defendant alleging that the defendant had executed two promissory notes payable to First American; that the balances on the notes were past due and owing, and; after demand, the defendant failed or refused to pay in accordance with the terms of the notes. The first note was in the principal amount of $75,000.00 and the second $25,000.00. At the time suit was brought the unpaid balances on the notes were $9,000.00 plus accrued interest and $24,386.80 plus accrued interest.

The defendant answered the complaint, pro se, and ostensibly combined his answer with a counterclaim although not designated as such. He sought a judgment against First American for substantial monetary damages. First American, in due course answered the counterclaim. First American also applied for attorney's fees in the amount of $3,967.12 on the first note and $14,974.29 on the second.

The case was heard at a bench trial and judgment was entered in favor of First American in the amount of $11,901.38 on the first note and $32,959.73 on the second note.[1] The judgment further

[1]A judgment was subsequently entered dismissing the counterclaim.

provided for post-judgment interest in the amount set out in the notes but reserved the question of attorney's fees pending submission of an affidavit by First American's attorney regarding attorney's fees "pursuant to DR-106 of the Code of Professional Responsibility."

An affidavit was in due course filed by the plaintiff's attorney. A hearing was subsequently held and the court allowed First American a recovery of fifteen hundred dollars ($1,500.00) on each note for a total attorney's fee award of three thousand dollars ($3,000.00). It is from this judgment that this appeal is taken. The sole issue presented is whether the court erred in not awarding the plaintiff its full attorney's fees.

At the hearing the plaintiff's attorney testified by affidavit that he had contracted with the plaintiff for an attorney fee equal to one-third of the amount collected by the plaintiff, plus actual expenses incurred. He further deposed that the first note provided that the defendant would pay "all attorney's fees, all court costs and other costs of any collection." He stated that the second note provided that the defendant would pay "reasonable attorney's fees" and all other costs of collection incurred by the bank.[2] He further stated that he had expended not less than twenty-one (21) hours of time "just to get it to trial." There was no attempt made

[2]The record reflects that these statement of plaintiff's counsel are accurate.

to separate the time allotted to the collection of the notes from the time expended in preparing for and defending the counterclaim.

No other competent evidence was adduced at the hearing on attorney's fees. While there is a "statement of the evidence" purportedly filed pursuant to Rule 24(c), Tennessee Rules of Appellate Procedure, the statement contains only argument of the parties and no substantive evidence.

Without question contingency fees must be considered and tested by a standard of reasonableness. Thus, the first note whereby the defendant contracted to pay "all attorney's fees" must be construed as "all reasonable attorney's fees."

"... The trial court is not bound to enforce a contingency arrangement entered into by an attorney and client. When contingency arrangements result in fees that are excessive, the trial court retains the right under its disciplinary powers over lawyers practicing before it to limit the fee to an amount that is reasonable. See Dole v. Wade, 510 S.W.2d 909 (Tenn. 1974). See also Rules of the Supreme Court, Rule 8, DR 2-106." Hall v. Davis, an unreported opinion from this court at Nashville, opinion filed September 21, 1994.[3]

[3]While we recognize that these cases are dealing with a contract between an attorney and client, we deem this to be a distinction of no consequence.

The Supreme Court in Dole v. Wade, supra, also stated the following:

> The law in this state on the issue of the power of the court to determine the reasonableness of an attorney's fee, where such is stipulated in a note by percentage or otherwise, is that stated by the Court in Holston National Bank v. Wood, supra, [140 S.W. 31 (1911]. (Emphasis Added).

The rule in Wood, to which the court was referring is as follows:

> While a stipulation in a note for attorney's fees is valid and will be enforced by this court, the court is not bound by a provision to the effect that any particular amount shall be allowed for such fees, and, no matter what the stipulation as to the amount is made in the face of the note, it will not be enforced unless it appears reasonable to the court.

Wood, supra, at page 34.

Perhaps the leading case on the award of attorney's fees is Conners v. Conners, 594 S.W.2d 672 (Tenn. 1980). In Conners it is said:

> The appropriate factors to be used as guides in fixing a reasonable attorney's fee have been phrased in various terms over the years, but may be summarized as follows:
>
> 1. The time devoted to performing the legal service.
>
> 2. The time limitations imposed by the circumstances.

> 3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
>
> 4. The fee customarily charged in the locality for similar legal services.
>
> 5. The amount involved and the results obtained.
>
> 6. The experience, reputation, and ability of the lawyer performing the legal service.
>
> See Folk v. Folk, 210 Tenn. 367, 379; 357 S.W.2d 828, 829 (1962). These are substantially the guidelines listed in Supreme Court Rule 38, Code of Professional Responsibility, D.R. 2-106. The additional factors listed in Rule 38 should be given consideration when relevant.

Conners, page 676.

We are of the opinion that under the proof offered the contract fee between the plaintiff and its attorney is manifestly unreasonable as between the plaintiff and the defendant. This is not to say that the contractual fee arrangement with the bank is unreasonable, but is a simple finding by this court that the fees sought from the defendant are not supported by the evidence submitted to the chancellor.

In Dover v. Dover, this court, citing Conners v. Conners, supra, stated:

> It is the policy of the courts not to interfere with the allowance of attorney's fees by the trial court unless some injustice is perpetrated. The courts, however, will scrutinize the amount of fees to determine whether they are excessive or inequitable.

Dover, page 595.

We do not believe that the amount of attorney's fees awarded to the plaintiff are inequitable under the evidence presented in this case. Since the sole issue presented is whether the court erred in not awarding the plaintiff its full attorney's fees [as requested] we simply respond in the negative. Nothing further is required for the disposition of this appeal.

We affirm the judgment of the trial court in all respects. Costs of this appeal are assessed against the appellant and this cause is remanded to the trial court for the collection thereof.

_____
Don T. McMurray, J.

CONCUR:

_____
Houston M. Goddard, Presiding Judge

_____
Herschel P. Franks, J.

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JAMES W. ROBINSON,	)	AFFIRMED AND REMANDED
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ORDER

This appeal came on to be heard upon the record from the Chancery Court of Washington County, briefs and the argument of plaintiff's counsel. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court in all respects. Costs of this appeal are assessed against the appellant and this cause is remanded to the trial court for the collection thereof.

PER CURIAM