

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-000301-MR

DIKTIC, INC.

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 99-CI-00900

THE SOMERSET REFINERY, INC.  
AND FRANCIS B. LYNCH

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND JOHNSON, JUDGES.

BUCKINGHAM, JUDGE: Diktic, Inc., appeals from a summary judgment rendered by the Pulaski Circuit Court in favor of The Somerset Refinery, Inc., and Francis B. Lynch. We affirm.

In 1994, Francis Lynch, a resident of South Carolina, and other persons were interested in purchasing a refinery owned by The Somerset Refinery, Inc., in Somerset, Kentucky. However, federal government agencies had filed a civil action against the Somerset Refinery for injunctive relief, fines, and penalties

amounting to more than \$376 million for environmental law violations. Lynch contacted Diktic and Elijah Petty, chairman of Diktic's board of directors, to perform an environmental analysis of the Somerset Refinery in order to assist Lynch's group in acquiring it. Petty was a chemical engineer, and Diktic was an environmental and chemical process engineering consulting company. Eventually, the parties entered into a written contract.

On October 20, 1999, Diktic filed a civil action in the Pulaski Circuit Court against The Somerset Refinery, Inc., and Lynch. Diktic alleged that it was owed \$396,835.38 for services it had provided. On December 11, 2001, the circuit court awarded summary judgment in favor of The Somerset Refinery, Inc., and Lynch. The court held that Diktic lacked the standing and capacity to maintain the civil action. First, the court held that Diktic had transacted business in Kentucky in violation of KRS<sup>1</sup> 271B.15-010(1) which provides that "[a] foreign corporation shall not transact business in this state until it obtains a certificate of authority from the secretary of state." Further, the court cited KRS 271B.15-020(1) which states that "[a] foreign corporation transacting business in this state without a certificate of authority shall not maintain a proceeding in any court in this state until it obtains a

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<sup>1</sup> Kentucky Revised Statutes.

certificate of authority." Second, the court stated that Diktic provided engineering services in Kentucky even though it was not licensed to do so. The court concluded that this action violated KRS 322.020 and KRS 322.060. Further, the court relied on Board of Educ. of Ferguson Indep. Graded Sch. Dist. v. Elliott, 276 Ky. 790, 125 S.W.2d 733 (1939), and held that the contract between the parties was void because Diktic was not a licensed engineering firm in this state. This appeal by Diktic followed.

Diktic raises the following arguments in its appeal:

(1) that its activity was business transacted in interstate commerce and was thus excluded from the KRS 271B.15-010(1) requirement that it obtain a certificate of authority; (2) that even if it had engaged in business within the Commonwealth that would have required it to register, it was error to dismiss the complaint for services performed based on a failure to register; (3) that it did not perform engineering services in Kentucky; (4) that even if its work could be deemed to be the providing of engineering services within this state, the circuit court nonetheless erred by preventing it from suing to recover for the services it provided; (5) that The Somerset Refinery, Inc., and Lynch profited from Diktic's efforts and are estopped from denying its authority to act or to sue; and (6) that summary judgment was improper because there were genuine issues of

material fact and because it was not permitted to complete discovery.

We do not believe that it is necessary to address any of these issues in order to dispose of this appeal. We deem it unnecessary to determine whether there were genuine issues of material fact concerning whether Diktic transacted business in this state, whether Diktic performed engineering services in this state, and other issues. Rather, we conclude that Diktic lacked the capacity to sue at the time it filed the civil action in the Pulaski Circuit Court and that it was thus precluded from maintaining the action.

In Diktic's complaint filed in the circuit court on October 20, 1999, it averred that it was "a duly organized corporation authorized to do business in the Commonwealth of Kentucky." During discovery, Somerset Refinery and Lynch learned that Diktic had been incorporated in the state of Illinois in 1977 but that its corporate charter had been administratively dissolved effective October 1, 1992. Therefore, Diktic had been dissolved as a corporation when it entered into the contract with Somerset and Lynch in 1994 and

when it filed the civil action in 1999. Furthermore, Diktic had not been reinstated as a corporation in Illinois.<sup>2</sup>

Somerset and Lynch argued to the circuit court that Diktic lacked the capacity to sue because it was not a corporation in good standing. Although the trial court concluded in its summary judgment that Diktic lacked the capacity and standing to sue, it did so on grounds that Diktic transacted business in Kentucky without being registered and that it provided engineering services without being licensed. It did not address the specific argument that Diktic lacked the capacity to sue because it had been previously dissolved as a corporation. We believe that argument had merit, and we affirm the circuit court on that ground.<sup>3</sup>

"Except as otherwise specifically provided by statute, the general rule is that after the dissolution and termination of the existence of a corporation, no action can be maintained against it, and it has no capacity to sue." 19 AmJur 2d Corporations § 2896 (1986). Furthermore, the case cited by Somerset and Lynch in their brief is persuasive. Quoting older authority, the court in Leiserson & Adler, Inc. v. Keam, Ky.,

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<sup>2</sup> Diktic eventually incorporated again in 2001. However, under Illinois law this incorporation did not relate back to the date of the 1992 dissolution.

<sup>3</sup> "[W]e, as an appellate court, may affirm the trial court for any reason sustainable by the record." Kentucky Farm Bureau Mut. Ins. v. Gray, Ky. App., 814 S.W.2d 928, 930 (1991).

266 S.W.2d 352 (1954), stated that “[t]he dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued.” Id. at 354. We conclude that Diktic did not exist as a corporate entity when it filed its civil action against Somerset and Lynch and that it thus lacked the capacity to file the action.<sup>4</sup>

Diktic also argues that Somerset and Lynch are estopped from denying Diktic’s capacity to sue. In support of this argument, it cites Yellow Chief Coal Company’s Trustee v. Johnson, 166 Ky. 663, 179 S.W. 599 (1915), wherein the court stated that “[i]t has been repeatedly held by this court that where a person executes an obligation to a corporation he can not, in an action on it by the corporation, deny that such a corporation had an existence.” 166 Ky. 669. That principle of law is not applicable here because the civil action herein was not brought by an existing corporate entity.

We note that Diktic also argued that summary judgment was not appropriate because it was not allowed the opportunity to complete discovery. See Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co., Ky. App., 579 S.W.2d 628, 630 (1979). Diktic did not dispute, either before the circuit court or this court, that it was a dissolved corporation when it filed the

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<sup>4</sup> Kentucky Rules of Civil Procedure (CR) 17.01 provides in part that “[e]very action shall be prosecuted in the name of the real party in interest.” Diktic was not the real party in interest.

civil action against Somerset and Lynch. Further, it made no showing that further discovery could possibly have changed the facts. Because there were no fact issues regarding the issue of capacity to sue, the circuit court did not err in awarding summary judgment prior to the completion of discovery.

The judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Larry F. Sword  
Somerset, Kentucky

BRIEF FOR APPELLEES:

James V. Magee, Jr.  
Cincinnati, Ohio